

Entered

JUL 25 1969

F 2302

San Francisco Law Library

436 CITY HALL

No. 192731


EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

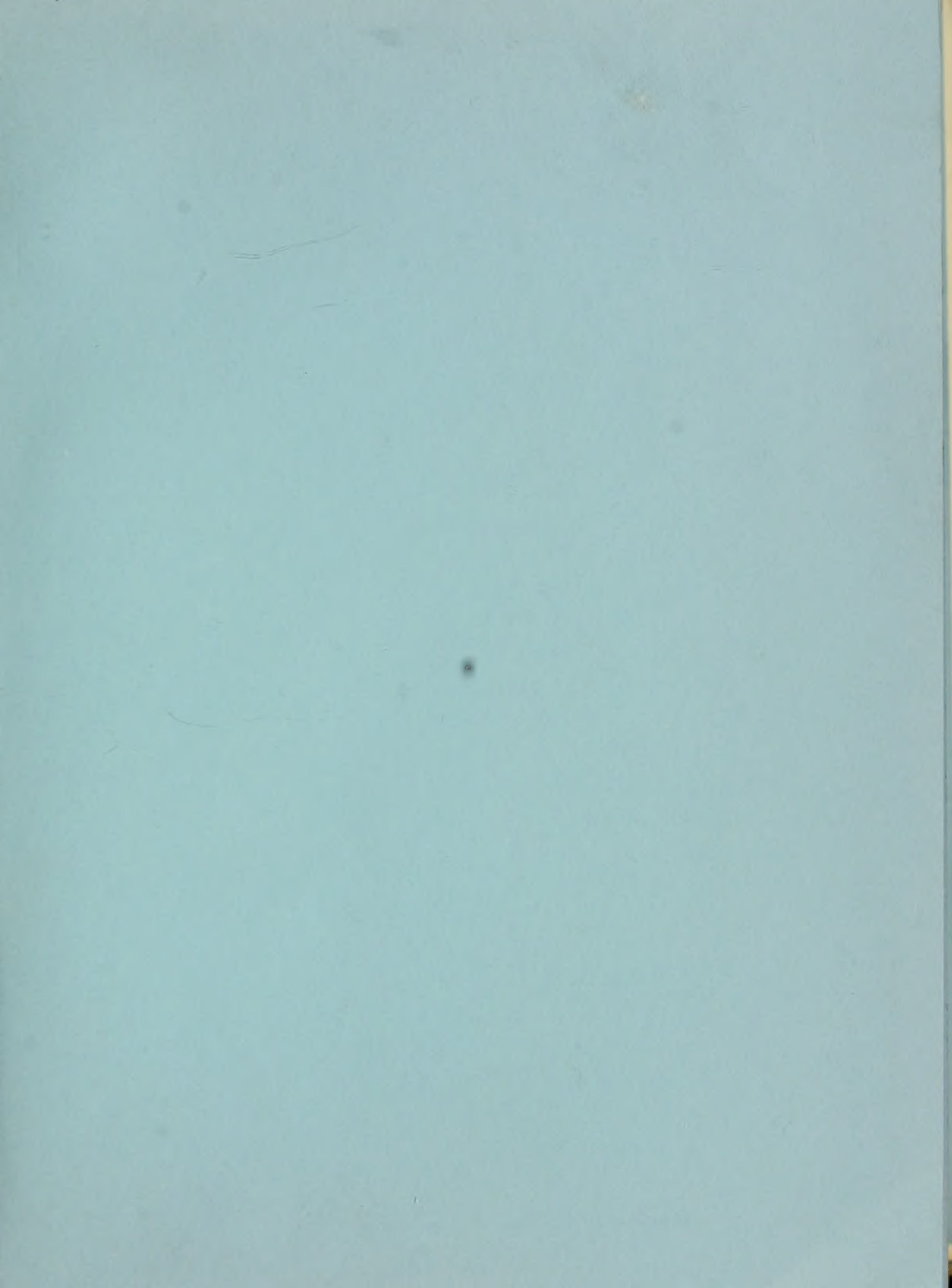
Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.





Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

3467 ✓

V. 3467

ARTHUR B. SMITH,

Petitioner-Appellant,

vs.

No. 22203

THE PEOPLE OF THE STATE OF CALIFORNIA,
ET AL.,

Respondents-Appellees.

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

MICHAEL BUZZELL
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-0311

FILED

NOV 14 1967

WM. B. LUCK, CLERK

Attorneys for Respondents-Appellees

NOV 24 1967

TOPICAL INDEX

Page

JURISDICTION	1
STATEMENT OF THE CASE	
A. <u>Proceedings in State Courts</u>	1
B. <u>Proceedings in the Federal Courts</u>	2
APPELLANT'S CONTENTIONS	2
SUMMARY OF APPELLEE'S ARGUMENT	2
ARGUMENT	3
I. WITH RESPECT TO THE ISSUE OF ADEQUATE TRIAL COUNSEL, APPELLANT HAS FAILED TO EXHAUST STATE REMEDIES.	3
II. APPELLANT HAS NOT ALLEGED A VIOLATION OF FEDERAL CONSTITUTIONAL RIGHTS.	4
CONCLUSION	4

TABLE OF CASES

Collins v. Wilson, 368 F.2d 995, 996 (9th Cir. 1966)	4
Escobedo v. Illinois, 378 U.S. 478 (1964)	4
Fay v. Noia, 372 U.S. 391 (1963)	3
Holley v. Cheuvront, 351 F.2d 615 (9th Cir. 1965)	3
In re Poe, 65 Cal.2d 25 (1966)	3
In re Rose, 62 Cal.2d 384 (1965)	3
Johnson v. New Jersey, 384 U.S. 719, 734 (1966)	4

TABLE OF CASES CONT'D

	<u>Page</u>
Pate v. Wilson, 348 F.2d 900 (9th Cir. 1965)	3
People v. Dorado, 62 Cal.2d 338 (1965)	4

STATUTES AND AUTHORITIES

United States Code Title 28 § 2254	4
---------------------------------------	---

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARTHUR B. SMITH,

Petitioner-Appellant,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
ET AL.,

Respondents-Appellees,

No. 22203

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's application for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

On January 20, 1965, a judgment of conviction was entered against appellant for the crime of murder. Appellant

appealed this conviction, and the conviction was affirmed by the California Court of Appeal, Second Appellate District, Division Three. A copy of the Court of Appeal's opinion is attached as Appendix A. The California Supreme Court denied on February 16, 1966, petitioner's application for a hearing. No additional efforts to secure relief were made by petitioner in the California courts.

B. Proceedings in the Federal Courts

In May of 1967, appellant petitioned the United States District Court for the Northern District of California for a writ of habeas corpus. (RT 1). Judge Carter of that court denied the petition on May 3, 1967 (RT 27-28). On June 2, 1967, a certificate of probable cause for appeal was issued (RT 33), and on June 30, 1967, appellant was granted leave to proceed in forma pauperis (RT 59-61).

APPELLANT'S CONTENTIONS

1. Appellant's trial counsel was inadequate.
2. Incriminating statements were introduced into evidence against appellant in violation of his constitutional rights.

SUMMARY OF APPELLEE'S ARGUMENT

I. With respect to the issue of adequacy of trial counsel, appellant has failed to exhaust state remedies.

II. Petitioner has not alleged a violation of federal constitutional rights.

ARGUMENT

I

WITH RESPECT TO THE ISSUE OF
ADEQUATE TRIAL COUNSEL, APPELLANT
HAS FAILED TO EXHAUST STATE
REMEDIES.

Appellant in his petition argued that he did not receive adequate aid from counsel at his trial. This issue was not raised on appeal in the California Court of Appeal (See Appendix A), nor has it been raised in any court of this state, even though in California habeas corpus is available to test the competency of trial counsel. See, e.g., In re Poe, 65 Cal.2d 25 (1966); In re Rose, 62 Cal.2d 384 (1965).

"A state prisoner may not bypass state courts which have the first duty to determine his rights. He must have exhausted all practicable state court remedies before he becomes entitled to federal court consideration of his claims." Holley v. Cheuvront, 351 F.2d 615 (9th Cir. 1965), citing Fay v. Noia, 372 U.S. 391 (1963) and Pate v. Wilson, 348 F.2d 900 (9th Cir. 1965).

It is clear, therefore, that inasmuch as appellant failed to raise the issue of competency of counsel in the California courts, the District Court properly refused to

consider the claim. Title 28 U.S.C. § 2254.

II

APPELLANT HAS NOT ALLEGED A VIOLATION OF FEDERAL CONSTITUTIONAL RIGHTS

Appellant argues that statements taken in violation of his rights as enunciated in Escobedo v. Illinois, 378 U.S. 478 (1964) and People v. Dorado, 62 Cal.2d 338 (1965) were introduced against him at trial. The California Court of Appeal held that the rule of Dorado had been violated, but that the error was harmless. See Appendix A.

The determination by the California Court of Appeal that Dorado was violated is, of course, immaterial to the instant appeal. As the District Court properly held, appellant did not establish a violation of Escobedo, for he did not allege that he requested counsel prior to the interrogation eliciting the challenged statements. See Johnson v. New Jersey, 384 U.S. 719, 734 (1966); Collins v. Wilson, 368 F.2d 995, 996 (9th Cir. 1966). No violation of a federal constitutional right being alleged with respect to appellant's second ground for issuance of the writ, the court below properly ruled that the contention was without merit.

CONCLUSION

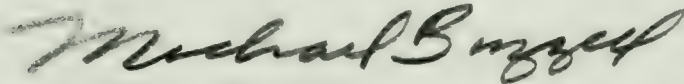
For the reasons stated above, it is respectfully submitted that the order of the District Court denying

appellant's petition for the writ of habeas corpus should be affirmed.

Dated: November 15, 1967.

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General



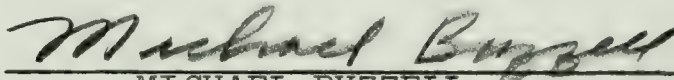
MICHAEL BUZZELL
Deputy Attorney General

Attorneys for Respondents-Appellees

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: November 15, 1967.


MICHAEL BUZZELL
Deputy Attorney General

A majority of the signers of the following opinion certify that it does not need the standard form official publication under Rule 975.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA *STOUTT*

SECOND APPELLATE DISTRICT

DIVISION THREE

DOCKET	
CR. L.A.	
No.	<i>65-265</i>
Entered by	<i>EC</i>
Date	<i>12-26-65</i>

THE PEOPLE,

Plaintiff and
Respondent,

vs.

ARTHUR BENJAMIN SMITH,

Defendant and
Appellant.

2nd Criminal No. 10778

DIST. CLERK

DEC 26 1965

Deputy Clerk

Appeal from judgment of the Superior Court of Los Angeles County. Donald R. Wright, Judge. Affirmed.

For Appellant: Patrick J. Sampson, under appointment by the District Court of Appeal.

For Respondent: Thomas C. Lynch, Attorney General; William E. Jones, Assistant Attorney General; Bradley A. Stoutt, Deputy Attorney General.

The defendant was found guilty of murder in the first degree in a nonjury trial, and was sentenced to life imprisonment in the state prison. He predicates his appeal upon the sole ground that the admission into evidence of the transcript of the interrogation of the defendant constituted

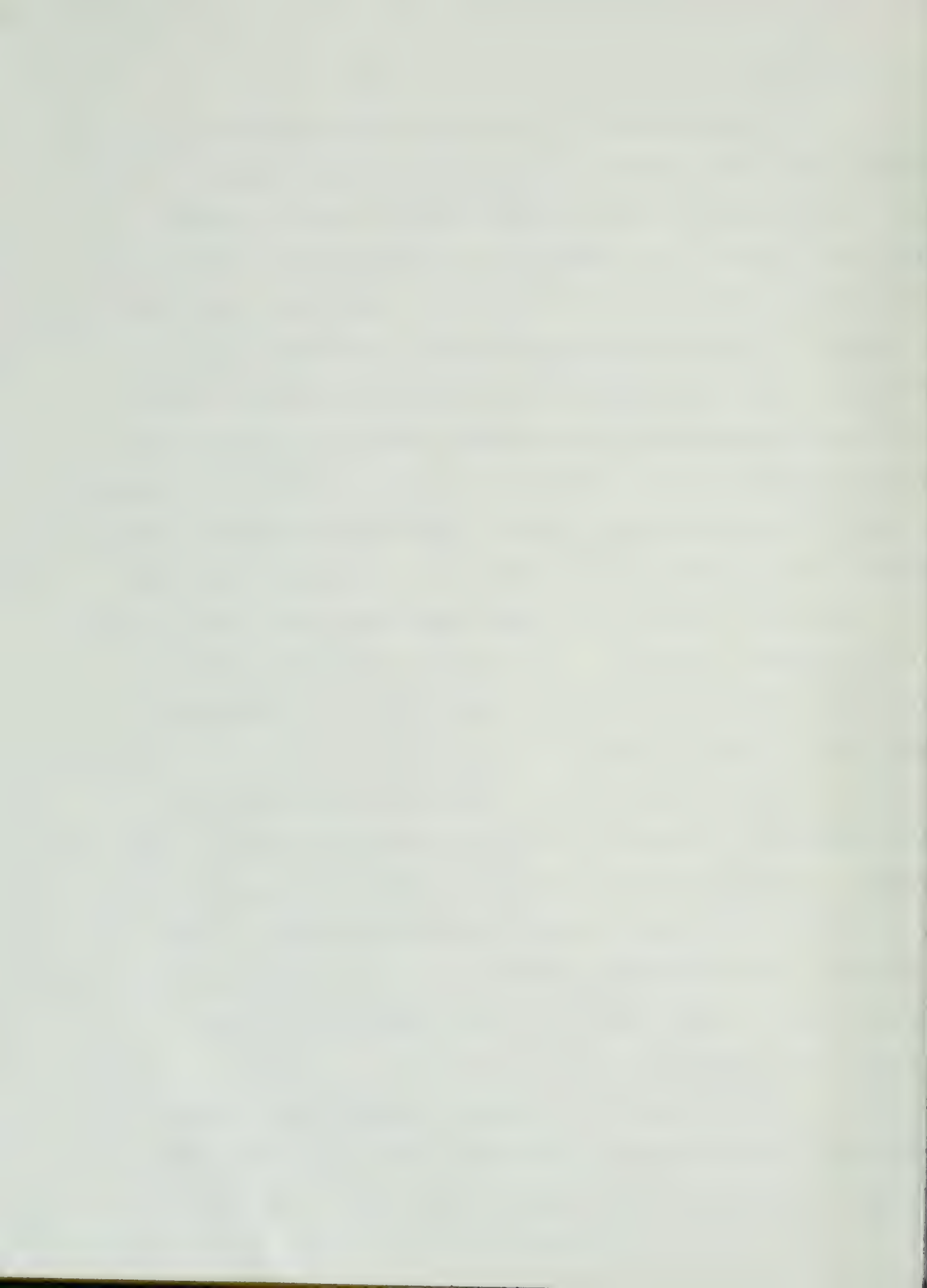


versible error under People v. Bonado, 62 Cal. 2d 330.

The defendant was estranged from his wife. On August 8, 1964 Eldon Smith, aged sixteen, was home with his mother when his father, the defendant, arrived about 11 a.m. to get his clothes. His mother left the living room and went to her bedroom to get dressed for work. His father went into the bedroom. "They were talking about her reconsidering about divorce. And she told him to go back in the living room." About ten to twenty minutes later Eldon observed his father return to the bedroom with a razor in his hand, and close the bedroom door. It automatically locked. Almost simultaneously Eldon heard his mother scream and she "hollered" for him to "call the police." Eldon ran next door and could still hear his mother scream while phoning the police. She was no longer screaming when he returned. The bedroom door was still locked. He heard his mother say "Oh, God, I didn't mean to do it."

When Deputy Sheriff Tolfe arrived he observed a female lying on the floor with blood all over her clothing. The defendant was cradling her in his arms, sobbing and stating, "My God, what did I do." The officer asked the defendant, "What did you do?" The defendant reached to the floor and picked up a straight-edged razor, handed it to the officer and said, "I did it with this, sir."

A short time later Deputy Sheriff Jones arrived. The defendant was standing in the living room. He was crying and saying, "Oh, God, help her. I didn't mean to hurt her." The officer



received three cuts on the left side of defendant's neck and
 led him where he got them. The defendant replied that he did
 and removed a pocketknife from under the pillow of the victim.
 The victim died before the ambulance arrived. A deputy medical
 examiner ascribed the cause of the death of the victim to be a
 laceration of the left common carotid artery.

On the evening of the 8th or 9th of August, 1934
 the owner of a trailer park entered a trailer which she had rented
 the defendant wherein she found a wrapper for a "dubl duck"
 razor on the bed. A dubl duck razor was the death instrument.

The defendant was interrogated by Deputy Sheriffs
 L. Sholund and Arthur Stoyanoff of the Los Angeles County
 Sheriff's Department about 7 p.m. the same day at the East Los
 Angeles Sheriff's Station in the presence of a stenographer. He
 denied entering the bedroom of his wife with a razor in his hand
 and denied bringing a razor to the house. He stated that when
 his wife accused him of going out with another woman he observed
 she had a knife in her hand. He knocked the knife out of her
 hand. He further stated that she went to her purse and obtained
 the razor with which she was going to attack him. He took the
 razor away from her and cut her once with it. When asked whether
 he cut her more than once the defendant replied, "I don't know.
 When I knocked the razor out of her hand and grabbed it and swung
 at her, then when she fell, I fell with her. Whether I cut her
 I don't know, but I grabbed her and started hollering for an am-
 bulance." The defendant stated he was trying to defend himself

when his wife was cut. That he felt his wife was trying to hurt him because she told him that she was going to get rid of him.

At the time of the trial the defendant took the stand and testified that his wife had cut her own throat. The defendant contends that the first statement made to Officer Tolfe was an admission and that the second statement made to Deputy Sheriffs Sholani and Steynoff was a confession, therefore he maintains, the judgment of the trial court should be automatically reversed under the rule of People v. Donado, supra, 62 Cal. 2d 33. The converse of these contentions appears to be more tenable. An admission as applied to criminal law is something less than a confession, and is but an acknowledgement of some fact or circumstance which in itself is insufficient to authorize a conviction, and which tends only toward the proof of the ultimate act of guilt. On the other hand, a confession by a defendant leaves nothing to be determined, in that it is a declaration of intentional participation in a criminal act, and must be a statement of such a nature that no other inference than the guilt of the defendant may be drawn therefrom. (People v. Strong, 30 Cal. 151; People v. Boyton, 49 Cal. 632; People v. Valverde, 59 Cal. 457; People v. Miller, 122 Cal. 34 [54 Pac. 513].) As stated in Michaels v. People, 208 Ill. 603 [70 N.E. 747], citing 3 Cyc. 2; 1 Greenleaf on Evidence, sec. 170; Johnson v. People, 197 Ill. [64 N.E. 226]: 'A confession is a voluntary acknowledgment by a person charged with the commission of a crime that he is guilty of the offense. It is a voluntary declaration by a person charged



with a crime of his agency or participation in the crime. It is not equivalent to statements, declarations, or admissions of facts exonerating in their nature or tending to prove guilt. It is limited in its meaning to the criminal act, and is an acknowledgment or admission of participation in it." (People v. Tardiff, 94 Cal. 555, 566-9.)

The statement to the effect that he cut his wife's throat with a straight-edged razor is an admission of guilty conduct which involves criminal intent. The specific intent to kill is presumed from the guilty conduct admitted by him and thus would come within the category of a confession. But when the statement of guilty conduct is such that it does not involve criminal intent where it constitutes facts amounting to justification or excuse for the defendant's acts it is an admission rather than a confession. (People v. Elder, 55 Cal. App. 644.) We, therefore, conclude that the second statement which attempts to negative an unlawful intent is an admission rather than a confession.

The appellant contends that the statement made to Officer Telfe to the effect that the defendant had cut his wife with a straight-edged razor was legally admissible. At the time the said statement was made by defendant the officer had just arrived at the scene. The defendant was neither in custody, nor had suspicion been cast upon him, nor had the interrogation reached an accusatory stage, therefore the Boyd rule requiring the law enforcement officer to inform a defendant of his right to counsel or of his absolute right

remain silent, is inapplicable. (People v. Garza, 235 Cal. p. 2d ____.) However, the opinion in People v. Brown, 59 Cal. 2d 338, 354, expressly states that "Nothing that we have said, of course, should be interpreted to restrict law enforcement officers during the investigatory stage from securing information from one who is later accused of the crime or from obtaining answers to their questions. Indeed, any statements obtained without coercion, including, of course, the unsolicited, spontaneous confession, given in the absence of the requirements for the accusatory stage, may be admitted into evidence."

In the instant case it appears that the accusatory stage was reached when the defendant was interrogated at the Sheriff's station. The defendant had previously admitted he committed the crime resulting in the death of his wife; he was in custody; the investigation focused upon him; and the questioning lent itself to obtaining incriminating statements. Under the Escobedo rule it was incumbent upon the officers to inform the defendant of his right to counsel and to remain silent prior to the interrogation. It was, therefore, error to admit such statements. (Escobedo v. Illinois, 378 U.S. 476, 491; People v. Brown, supra, 62 Cal. 2d 338; People v. Stewart, 62 Cal. 2d 571.) Brown further holds (p. 356): "Although under some circumstances the introduction into evidence of statements obtained from a defendant during police interrogation in violation of his right to counsel and his right to remain silent may constitute

unless error, we are convinced that the error is reasonably prejudicial when the statements are confessions." The second statement which we determine to be an admission is not prejudicial as such, and thus does not automatically require a reversal. (People v. Schoder, 62 Cal. 2d 716, 728.) The effect of the second statement is inferentially accusatory, and in our opinion comes within the release error rule announced in People v. Watson, 40 Cal. 2d 813, 5-833.

However, even if we were to assume that the second statement was a confession, nevertheless the defendant had made an earlier admissible confession. The introduction into evidence of a confession obtained by the police in violation of People v. Watson, supra, 62 Cal. 2d 313, is harmless error where the defendant made an earlier admissible confession. (People v. Carter, 63 Cal. 2d ____; People v. Jacobson, 63 Cal. 2d ____; People v. [redacted], 234 Cal. App. 2d ____.)

A review of the record impels the conclusion that the defendant suffered no prejudice by the introduction of the second statement.

In view of the evidence, there is no reasonable probability that the trial court would have reached a result more favorable to the defendant if the statement complained of had been

Advance Report Citation: 63 A.C. 434, 410-16.

Advance Report Citation: 63 A.C. 335.

Advance Report Citation: 234 A.C.A. 557, 571.

cluded. (People v. Watson, supra, 46 Cal. 2d 818, 836; California Constitution, Article VI, section 4-1/2.)

Judgment affirmed.

WICKER, J. pro tem

2 concur.

SHINN, P. J.

FORD, J.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENJAMIN GINSBERG,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

MITCHELL ROGOVIN,
Assistant Attorney General,

LEE A. JACKSON,
JOSEPH M. HOWARD,
JEANINE JACOBS,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

Of Counsel:

WILLIAM M. BYRNE, JR.,
United States Attorney.
LOYAL E. KEIR,
DONALD M. FENMORE,
Assistant United States Attorney.

FILED

APR 25 1968

WMA B LUCK CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENJAMIN GINSBERG,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

MITCHELL ROGOVIN,
Assistant Attorney General,

LEE A. JACKSON,
JOSEPH M. HOWARD,
JEANINE JACOBS,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

Of Counsel:

WILLIAM M. BYRNE, JR.,
United States Attorney.
LOYAL E. KEIR,
DONALD M. FENMORE,
Assistant United States Attorney.

I N D E X

	<u>Page</u>
Opinion below-----	1
Jurisdiction-----	1
Questions presented-----	3
Statutes and Rules involved-----	3
Statement-----	4
Summary of argument-----	15
Argument:	
I. The District Court correctly granted the Government's motion for summary judgment where pretrial discovery revealed no fact in dispute regarding the propriety and correctness of the federal excise tax on wagering assessed against the taxpayer-----	18
A. Introduction-----	18
B. The granting of the Government's Motion for Summary Judgment was correct according to law-----	21
II. The taxpayer's motion for relief from judgment was addressed to the sound discretion of the District Court and where the record clearly showed that tax- payer could not have been more ably represented and that prior counsel had committed no act of neglect or error, the District Court did not abuse its dis- cretion in denying taxpayer's motion-----	30
Conclusion-----	32
Appendix-----	34

CITATIONS

Cases:

<u>Alamo Theater Co. v. Loews, Inc.</u> , 22 F.R.D. 42-----	29
<u>Bankers Coal Co. v. Burnet</u> , 287 U.S. 308-----	32
<u>Byrnes v. Mutual Life Insurance Co. of New York</u> , 217 F. 2d 497, certiorari denied, 348 U.S. 971-----	22, 28
<u>Bell v. Swift & Co.</u> , 283 F. 2d 407-----	22, 27
<u>Carlo v. United States</u> , 286 F. 2d 841, certiorari denied, 366 U.S. 944-----	6, 20, 21
<u>Chiquita Mining Co. v. Commissioner</u> , 148 F. 2d 306-----	32
<u>Field v. United States</u> , 263 F. 2d 758, certiorari denied, 360 U.S. 918-----	6, 20, 21
<u>Hickman v. Taylor</u> , 329 U.S. 495-----	22, 27
<u>Independence Lead Mines Co. v. Kingsbury</u> , 175 F. 2d 983, certiorari denied, 338 U.S. 900-----	31

Cases (continued):

<u>Kolstad v. United States</u> , 262 F. 2d 839-----	31
<u>Life Music, Inc. v. Broadcast Music, Inc.</u> , 41 F.R.D. 16---	22,28
<u>MacKay v. American Potash & Chemical Co.</u> , 268 F. 2d 512---	22,29
<u>O'Neill v. United States</u> , 198 F. Supp. 367-----	26
<u>Roybark v. United States</u> , 218 F. 2d 164-----	26
<u>S & S Logging Co. v. Barker</u> , 366 F. 2d 617-----	28,29
<u>Simpson v. Thomas</u> , 271 F. 2d 450-----	20,21
<u>Smith v. Stone</u> , 308 F. 2d 15-----	31
<u>United States v. Ginsberg</u> (S.D. Cal., No. 33824-Crim.)---	6
<u>United States v. Lease</u> , 346 F. 2d 696-----	26
<u>United States v. Molitor</u> , 337 F. 2d 917-----	26
<u>United States v. Procter & Gamble</u> , 356 U.S. 677-----	22
<u>United States v. Rindskopf</u> , 105 U.S. 418-----	26
<u>United States v. Sica</u> (S.D. Cal., No. 30435-CD)-----	6
<u>Welsh v. United States</u> , 220 F. 2d 200-----	20,21
<u>Western Union Telegraph Co. v. Dismang</u> , 106 F. 2d 362-----	32

Statutes:

Internal Revenue Code of 1954:

Sec. 4401 (26 U.S.C. 1964 ed., Sec. 4401)-----	34
Sec. 4403 (26 U.S.C. 1964 ed., Sec. 4403)-----	34
Sec. 4411 (26 U.S.C. 1964 ed., Sec. 4411)-----	34
Sec. 4412 (26 U.S.C. 1964 ed., Sec. 4412)-----	4,15
Sec. 4421 (26 U.S.C. 1964 ed., Sec. 4421)-----	18,35
Sec. 4901 (26 U.S.C. 1964 ed., Sec. 4901)-----	35
Sec. 6020 (26 U.S.C. 1964 ed., Sec. 6020)-----	36
Sec. 6201 (26 U.S.C. 1964 ed., Sec. 6201)-----	36
Sec. 6321 (26 U.S.C. 1964 ed., Sec. 6321)-----	37
Sec. 6322 (26 U.S.C. 1964 ed., Sec. 6322)-----	37
Sec. 6331 (26 U.S.C. 1964 ed., Sec. 6331)-----	37
Sec. 7201 (26 U.S.C. 1964 ed., Sec. 7201)-----	4, 7

Miscellaneous:

Federal Rules of Civil Procedure:

Rule 33-----	38
Rule 56-----	39
Rule 58-----	40
Rule 60-----	41

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22,204

BENJAMIN GINSBERG,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLEE

OPINION BELOW

The Findings of Fact and Conclusions of Law of the District Court
(R. 190-201) are not officially reported.

JURISDICTION

This appeal involves federal wagering excise taxes for the
second quarter of 1963 and wagering occupational taxes for the
fiscal years ended June 30, 1962 through 1964, and is taken from a
final judgment of the District Court in favor of the United States
entered on April 21, 1967. (R. 203.)

The amounts involved are as follows (R. 25, 27, 89):

<u>Nature of Tax</u>	<u>Period</u>	<u>Tax</u>
Wagering excise tax	April, 1963 - June, 1963	\$8,022.16
Wagering occupational tax	July 1, 1961 - June 30, 1962	87.68
Wagering occupational tax	July 1, 1962 - June 30, 1963	84.68
Wagering occupational tax	July 1, 1963 - June 30, 1964	81.68

The excise tax liability was satisfied to the extent of \$4,795.96, and the wagering occupational tax in full from \$5,050 seized by a special agent on June 6, 1964, incident to taxpayer's arrest. A notice of levy was served upon the special agent on July 1, 1964, to procure the funds pursuant to Section 6331, Internal Revenue Code of 1954. (R. 7, 79, 85, 86, 89, 92.) Taxpayer filed claim for refund of this sum on October 25, 1965 (R. 5), which claim was denied December 27, 1965 (R. 7). Within the time provided by Section 6532 of the Internal Revenue Code of 1954, on December 30, 1965, the taxpayer brought this action in the District Court for recovery of the \$5,050. (R. 2-7.) On March 30, 1966, and April 21, 1966, involuntary payments were secured by way of levy against taxpayer in the amounts of \$95.49 and \$1,090.09, respectively (R. 79), leaving, as of July 22, 1966, an unpaid balance owed to the Government of \$2,040.62 (R. 78-79, 89). For this sum the Government counterclaimed on July 22, 1966. (R. 78-80.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment of the District Court was entered on April 21, 1967.

(R. 203.) Within sixty days thereafter, on June 19, 1967, a notice of appeal was filed (R. 223), a notice of motion for relief from judgment having been filed June 2, 1967 (R. 205-210), and an order denying motion for relief from judgment having been filed June 19, 1967 (R. 222). Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the District Court erred in granting the Government's motion for summary judgment when it became evident, as a result of pretrial discovery that there was not a single fact in dispute regarding the propriety and correctness of the federal wagering excise tax assessment here in issue.

2. Whether the District Court abused its discretion in denying taxpayer's motion for relief from judgment on grounds of alleged neglect or error by taxpayer's former counsel, where it appeared to the District Court that taxpayer could not have been more ably represented by anyone and that taxpayer's former counsel did not commit any act of neglect or error.

STATUTES AND RULES INVOLVED

The statutes and rules involved in this case are to be found in the Appendix, infra.

STATEMENT

The facts, as found by the District Court (R. 190-199), are as follows:

Prior to June 6, 1964, special agents of the Internal Revenue Service's Intelligence Division obtained from the rubbish can of the taxpayer mutilated wagering records in the handwriting of the taxpayer. These records were then reconstructed by the Government agents. (R. 190-191.)

On June 6, 1964, the special agents arrested the taxpayer for alleged violations of Sections 4401, 4411 and 7201 of the Internal Revenue Code of 1954. Incident to the arrest, \$5,050 in United States currency was confiscated, along with other bookmaking paraphernalia belonging to the taxpayer. (R. 191.)

The federal grand jury on June 25, 1964, indicted taxpayer under Section 7201 of the 1954 Code of five counts of willfully attempting to evade or defeat the federal wagering occupational tax as imposed by Sections 4401, 4411 and 4412, Internal Revenue Code of 1954. (R. 191.)

Based upon the reconstructed wagering records of the taxpayer, the District Director, on June 30, 1964, made a jeopardy assessment against the taxpayer in the sum of \$8,022.16 for wagering occupational taxes as required by 1954 Code Section 4401, plus other tax penalties, special taxes, and interest as imposed by 1954 Code Section 4411. Taxpayer's liability for taxes due and owing the United States is reflected on tax returns

prepared by revenue officers on behalf of the taxpayer under the authority of 1954 Code Section 6020(b). (R. 191.)

After various payments by the taxpayer, a subsequent adjustment of the taxpayer's tax liability, and application of the seized \$5,050 to the taxpayer's account, the Government's records reflect that the taxpayer still is indebted to the United States for excise (wagering) taxes, interest and penalties in the amount of \$2,223.70 as of March 10, 1967, plus interest thereafter as provided by law. (R. 191-192.)

For the purpose of applying the seized \$5,050 in partial payment of the taxpayer's excise tax liability, which sum had been deposited in the official trust account of Special Agent Andrew Furfaro, a revenue officer, on July 1, 1964, served a notice of levy on Special Agent Furfaro, and on the Chief of the Cashier Section, Internal Revenue Service, directing them to deliver the \$5,050 to the revenue officer for application to the taxpayer's excise tax liability account. (R. 192.)

The taxpayer filed a motion in the United States District Court to suppress the evidence obtained from his trash can by the special agents, and later reconstructed by them for use both in the criminal proceeding, and as a basis to compute the taxpayer's civil excise tax liability. In addition, the taxpayer moved the court for an order directing the District Director to return to him the seized \$5,050. This motion was argued on July 9, 1964. (R. 192.)

By order dated July 22, 1964, United States District Judge Jesse W. Curtis ruled that except for the \$5,050, all the evidence had been properly and lawfully seized, and therefore, taxpayer's motion to suppress the evidence was to be denied. As to the \$5,050 confiscated during the arrest, the court felt it had been illegally seized, and ordered the Government to return same to the taxpayer. (R. 192.)

Subsequently, on the authority of Carlo v. United States, 286 F. 2d 841, 848 (C.A. 2d), certiorari denied, 366 U.S. 944; Field v. United States, 263 F. 2d 758, 762 (C.A. 5th), certiorari denied, 360 U.S. 918; United States v. Sica, No. 30435-CD (S.D. Cal.), and other cases which held that even if the court finds the money was illegally seized, once a jeopardy assessment and levy is made upon the funds in satisfaction of a tax obligation which the taxpayer owes the Federal Government, those funds may be used to satisfy that obligation, and need not be returned to the taxpayer, the Government brought a motion for the court to vacate that part of its July 22, 1964 order which directed the Government to return the \$5,050 to taxpayer. (R. 193.)

Based upon this authority, the court, on November 6, 1964, entered a new order vacating that part of its **July 22d order** which had directed the Government to return the seized \$5,050 to taxpayer. (R. 193.)

Taxpayer's criminal trial commenced on April 6, 1965.
(United States v. Ginsberg, No. 33824-Crim., S.D. Cal.) Admitted

into evidence were the reconstructed wagering records which the revenue officers had previously used to compute the taxpayer's excise tax liability. On April 22, 1965, the jury found taxpayer guilty of all counts charged in the indictment. The same day his attorney, Marvin Zinman, made a motion for judgment of acquittal notwithstanding the verdict. This motion was taken under submission and continued until April 26, 1965. (R. 193.)

On April 26, 1965, the court stated that in its opinion, taxpayer was in fact engaged in the business of wagering, which would thus require him to pay the necessary fees and taxes. However, it felt that taxpayer had a bona fide belief that he was not in the business of wagering, and hence, could not form the requisite intent to "willfully" evade the payment of tax as required for a conviction under 1954 Code Section 7201. Upon this basis, the court granted the taxpayer's motion for acquittal notwithstanding the verdict. (R. 193-194.)

A "Final Demand" was served upon Special Agent Furfaro by a revenue officer on May 3, 1965, which demand was satisfied by Special Agent Furfaro removing said \$5,050 from his trust account and delivering same to the revenue officer for application to taxpayer's excise tax obligations. (R. 194.)

On December 30, 1965, the taxpayer filed the instant complaint against the United States for the recovery of money wrongfully collected and seized. He contended in his complaint and claim for refund that the Government agents acted

without right or color of authority of any kind by seizing the \$5,050, and that the Government's retention thereof was without right of any kind. (R. 194.)

With the court's approval, the Government, on July 22, 1966, filed a counterclaim against the taxpayer for the remaining excise tax liability of the taxpayer after application to his tax account of the seized \$5,050 plus other payments made by taxpayer. (R. 194.)

On December 12, 1966, the taxpayer answered the Government's interrogatories, to wit (R. 194-195):

Interrogatory No. 3

For the fiscal years 1962, 1963 and 1964, state with particularity every and all sources of your gross income.

Answer: Betting and gambling.

Interrogatory No. 6

For the fiscal years 1962, 1963 and 1964, if any of your gross income has been reported for tax purposes as derived from betting, state with specificity: a) the amount of each such bet; b) the subject matter of each such bet; c) the person or persons from whom you have received money as a result of such bets, including the telephone number and address of each.

Answer: I do not recall any of the information requested in your question. I have no records which would enable me to do so. I kept my records on a daily basis and destroyed the same on each succeeding day.

By answers dated January 30, 1967, taxpayer responded to interrogatories and requests for admissions served upon him by the Government, to wit (R. 195-196):

Request for Admission No. 2

The Federal Excise Tax assessment made against Mr. Ginsberg for wagering which is the subject of this lawsuit is a proper and correct assessment.

Response: Deny.

Interrogatory No. 2

If your answer to Request for Admission No. 2 is other than an unqualified admission, state with particularity what you find objectionable with the assessment.

Answer: Said assessment does not accurately reflect the total volume on a net basis of plaintiff's activities.

This answer of January 30th prompted the Government's counsel to file a new set of request for admissions and written interrogatories. They were answered by taxpayer on February 6, 1967, as follows (R. 196-197):

Interrogatory No. 2

Your response to Interrogatory No. 2 filed with the Court on January 6, 1967, states that the assessment does not accurately reflect the total volume on a net basis of plaintiff's activities. With respect to the assessment, state with particularity:

a. What you perceive the total volume on a net basis of plaintiff's activities to be.

Answer: I have no opinion on that subject.

b. Describe in detail every document upon which you rely to substantiate the total volume on a net basis of plaintiff's activities.

Answer: None.

c. The name and address of every witness which you intend to use at time of trial to disprove the accuracy of the Government's assessment against the plaintiff.

Answer: I contend that the accuracy or not of the alleged assessment is not to be an issue at the

trial of this case, and accordingly, I do not intend to offer evidence on the subject. If it is ruled to be an issue in the case, I will be the only witness for the plaintiff on the subject.

d. Description of all other evidence which you intend to use in your case-in-chief at time of trial, not covered by your answers to Interrogatories 2(b) and 2(c) above shown, to disprove the accuracy of the Government's assessment against the plaintiff.

Answer: I do not intend to offer documentary evidence on the subject.

In response to further Government request for admissions and interrogatories, the taxpayer, on February 13, 1967, answered as follows (R. 197):

Request for Admission No. 1

The defendant's retention of the \$5,050.00 was a correct, proper, and lawful retention.

Response: Deny.

Interrogatory No. 1

If your answer to Request for Admission No. 1 is other than an unqualified admission, state with particularity all facts upon which you claim that said retention was improper or unlawful.

Answer: Such money was not retained by defendant for any lawful, legitimate purpose other than to vex or harass the plaintiff; such retention did not have as its purpose the protection of the defendant's rights or the collection of taxes.

On March 6, 1967, the Government, through its counsel of record, Assistant United States Attorney Donald M. Fenmore, moved the court for an order compelling the taxpayer to further answer with particularity Interrogatory No. 2 filed on January 6, 1967, Interrogatory No. 2(a) and 2(d) filed on January 31, 1967, and

Interrogatories Nos. 1 and 2 filed on February 8, 1967; and in the alternative, if the taxpayer be either unwilling or unable to respond to the interrogatories served upon him by stating facts rather than mere legal conclusions, that taxpayer's complaint then be dismissed with prejudice, and that a deficiency judgment be entered against the taxpayer on the Government's counterclaim. (R. 198.)

United States District Judge Warren J. Ferguson, in response to this motion, ordered the taxpayer to "serve and file a further and as complete an answer as he is capable to Interrogatory numbers 2(a) and 2(d) filed by the defendant on January 31, 1967." (R. 198.)

Taxpayer's "further answer" of March 7, 1967, in compliance with the court order was (R. 198):

Interrogatory No. 2(a)

* * * State with particularity what you perceive the total volume on a net basis of plaintiff's activities to be.

Answer: I don't know.

In view of the fact that the taxpayer had already stated in his answers to the Government's interrogatories that with respect to the validity of the tax assessment, he did not intend to offer any documentary evidence on the subject, and that he did not know what the volume of his activities were during the period in question, the presumptive correctness of the Government's assessment necessarily must remain un rebutted. This being so, the Government, on March 15, 1967, filed a motion for summary judgment,

noticing the hearing for April 10, 1967, thus allowing the taxpayer approximately 26 days in which to prepare. (R. 198-199.)

On March 21, 1967, the taxpayer filed a memorandum in opposition to the motion for summary judgment. This memorandum failed to contain any opposing affidavit as required by Rule 56(e) of the Federal Rules of Civil Procedure and Local Court Rule 3(e)(4)(c), nor did it contain any statement of genuine issues which would set forth all material facts as to which it was contended there existed a genuine issue necessary to be litigated, as required by Local Rule 3(e)(4)(b). (R. 199.)

The failure by taxpayer to articulate a single fact he felt was left in dispute was pointed out to the court and taxpayer by Government's counsel in a reply memorandum filed March 28, 1967,-- 13 days prior to the hearing date. Throughout this 13-day period, taxpayer still did not state for the court any fact which he considered was left in dispute, nor did he do so during oral argument of the motion on April 10, 1967, or at any other time. (R. 199.)

On the basis of the foregoing facts, the District Court made the following conclusions of law (R. 200-201):

V. The Government agents acted lawfully and within their statutory authority when they made the jeopardy assessment against the plaintiff, levied upon his fund of \$5,050.00, and retained same for payment of the taxpayer's excise tax liability.

* * * * *

VII. One engaged in the business of accepting wagers cannot rebut the Government's wagering tax assessment against him on mere allegations that such assessment was arbitrary, excessive, invalid, and illegal. The assessment can be overturned only by the taxpayer producing records

and other evidence which clearly demonstrates the proper amount of tax which he owes the Government. Failing to produce such evidence, the Government's assessment is entitled to be reduced to judgment. O'Neill v. United States, 198 F. Supp. 367, 370 (E.D. N.Y. 1961).

VIII. Plaintiff could not produce one scintilla of evidence which tended in any way to rebut the correctness of the Government's assessment. Accordingly, the Government is entitled to a summary judgment against the plaintiff, to have the plaintiff's Complaint dismissed with prejudice, and to have a deficiency judgment against the plaintiff on its Counterclaim herein.

Pursuant to the foregoing, judgment was entered in favor of the United States on April 21, 1967. (R. 203.)

Thereafter, on June 2, 1967, the taxpayer filed a notice of motion for relief from judgment. (R. 205.) Taxpayer's affidavit which accompanied the notice of motion provided in pertinent part (R. 206):

I retained Marvin Zinman, attorney at law, to represent me in this action against the defendant for return of funds improperly levied upon as a result of an improper assessment made by the defendant.

In the course of the defense of the action, the Government propounded to me certain interrogatories and requests for admissions. On my former counsel's advice, I answered said interrogatories and requests for admissions in a manner which through inadvertance and neglect, gave the impression that I conceded the propriety of the filing of a return by the Government. All that was intended to be conceded by the answers was that I have engaged in gambling, not in receiving or accepting wagers in a manner which would make me liable for the payment of the gambling excise tax.

The interrogatories, the answers to which formed the basis for the order granting summary judgment, were ambiguous and referred to transactions which do not form the basis of liability for the gambling excise tax. My answers, through neglect and inadvertance, and in an attempt to be responsive to what were irrelevant and objectionable interrogatories, were used by the Government to confuse the true issue in this case, viz., the propriety of any return whatsoever being made rather than the accuracy of the return which was filed.

Plaintiff should not be penalized and deprived of his day in court for neglect or error by his former counsel.

The Government filed "Opposition to Plaintiff's Motion for Relief from Judgment" (R. 212-214) and on June 19, 1967, Judge Ferguson ordered taxpayer's motion for relief from judgment denied, it appearing to the Court (R. 222):

(1) The plaintiff could not have been more ably represented by anyone;

(2) plaintiff's former counsel did not commit any act of neglect or error.

This appeal followed. (R. 223.)

SUMMARY OF ARGUMENT

The District Court here granted summary judgment pursuant to motion by the Government where it appeared, as a result of pretrial discovery, that the Government's assessment of the taxpayer's wagering excise tax liability was wholly undisputed. The District Court also denied taxpayer's motion for relief from judgment, finding taxpayer's allegation of neglect and error by his former counsel in regard to the handling of the admissions and interrogatories involved in reaching judgment wholly unwarranted.

This case arose out of the satisfaction of taxpayer's civil tax liability to the extent of \$5,050 by means of funds levied upon by revenue officers pursuant to statutory authority in the Internal Revenue Code of 1954 while the funds rested in the trust account of special agents who had seized the funds incident to a prior lawful arrest of the taxpayer in connection with criminal proceedings. Taxpayer moved for return of the funds, but the District Court ultimately ruled that while these funds (but no other matter) had been illegally seized in connection with the arrest, they were nonetheless properly levied upon and accountable for satisfaction of taxpayer's civil wagering excise tax liability.^{1/}

^{1/} The civil tax liability was assessed subsequent to taxpayer's arrest for possible wilful (criminal) attempts to evade or defeat the federal wagering occupational tax as imposed by Sections 4401, 4411, and 4412, Internal Revenue Code of 1954 and based upon records that were not illegally seized.

Taxpayer challenges the granting of summary judgment of the District Court because he says it was never factually determined that his admitted betting and gambling activities were tantamount to being "engaged in the business of accepting wagers" as is required by statute. That this fact was in issue, however, was never once raised throughout almost a year's pretrial discovery activity. Suffice it to say that the pretrial discovery mechanism was introduced into the Federal Rules of Civil Procedure to take the guesswork out of trying cases.

Moreover Rule 56(e), Federal Rules of Civil Procedure, pertaining to summary judgment, affirmatively requires an adverse party who seeks to prevent the granting of a motion for summary judgment, to "set forth specific facts showing that there is a genuine issue for trial." This the taxpayer again failed to do either by memorandum and affidavit or at the hearing on the Government's motion. Indeed the taxpayer raised no factual dispute whatsoever concerning the propriety and correctness of the Government's assessment throughout the litigation. Under these circumstances, the Government was entitled to judgment as a matter of law.

The taxpayer's motion for relief from judgment was based on grounds of alleged neglect and error by his former counsel in not raising in discovery the issue heretofore mentioned. Naturally, as this Court has many times declared, such a question was directed to the sound discretion of the District Court which denied taxpayer's motion.

Former counsel not only was taxpayer's attorney throughout this litigation but successfully represented taxpayer in the prior criminal trial. If any attorney was familiar with the facts in this case, it was Marvin Zinman.

The District Court ruled that the taxpayer could not have been more ably represented by anyone and that taxpayer's former counsel did not commit any act of neglect or error. The ruling was clearly proper.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY GRANTED THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT WHERE PRETRIAL DISCOVERY REVEALED NO FACT IN DISPUTE REGARDING THE PROPRIETY AND CORRECTNESS OF THE FEDERAL EXCISE TAX ON WAGERING ASSESSED AGAINST THE TAXPAYER

A. Introduction

Section 4401 of the Internal Revenue Code of 1954, Appendix, infra, imposes on wagers an excise tax equal to 10 percent of the amount thereof.^{2/} The statute goes on to provide, at Section

^{2/} For purposes of this chapter, Section 4421 (1) and (2), Internal Revenue Code of 1954 provides:

(1) Wager.--The term "wager" means--

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) Lottery.--The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include--

(A) any game of a type in which usually

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and

(B) any drawing conducted by an organization exempt from tax under sections 501 and 521, if no part of the net
(continued)

4401(c), that "Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

Based upon the taxpayer's own bookmaking records, properly confiscated pursuant to the lawful arrest of June 6, 1964 (R. 191-192), the District Director of Internal Revenue on June 30, 1964, assessed against taxpayer a 10 percent federal excise tax on \$61,005--this amount having been determined by the District Director to represent the gross amount of wagers accepted by taxpayer from April, 1963, through June, 1963. Added to the \$6,100.50 tax was a penalty of \$1,525.13 plus interest of \$396.53 for a total federal excise tax assessment of \$8,022.16. (R. 25, 31.) The excise tax return of taxpayer was prepared by the District Director pursuant to Section 6020(b) of the Internal Revenue Code of 1954. (See Appendix, infra.)

Under the provisions of Section 4411 of the Internal Revenue Code of 1954, Appendix, infra, there is "imposed a special tax of \$50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable." The Internal Revenue Code of 1954, Section 4901(c), Appendix, infra, provides that "All special taxes imposed by law shall be paid by stamps denoting the tax." Where

2/ (continued)

proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

the special taxes have not been duly paid by stamp at the time and in the manner provided by law, the Secretary or his delegate has the power to make the assessments.

Taxpayer failed to purchase the federal excise tax stamps required; the Government assessed the tax for the periods July 1, 1961 to June 30, 1962, July 1, 1962 to June 30, 1963, and July 1, 1963 to June 30, 1964. (R. 32-34.)

The taxes assessed were satisfied to the extent of \$5,050, which sum was confiscated along with other bookmaking paraphernalia belonging to the taxpayer, incident to the arrest of June 6, 1964. The sum had been deposited in the official trust account of the special agent involved and on July 1, 1964, a revenue officer served a notice of levy on the special agent (and on the Chief of the Cashier Section, Internal Revenue Service), directing them to deliver the \$5,050 to the revenue officer for application to the taxpayer's tax liability and it was finally so applied. (R. 191-192.) This application is consistent with applicable case law inasmuch as even though it is found, as it was here (R. 193), that the money was illegally seized, once a jeopardy assessment and levy is made upon the funds in satisfaction of a tax obligation which the taxpayer owes the Federal Government, those funds may be used to satisfy that obligation and need not be returned to the taxpayer. Welsh v. United States, 220 F. 2d 200 (C.A. D.C.); Field v. United States, 263 F. 2d 758 (C.A. 5th), certiorari denied, 360 U.S. 918; Simpson v. Thomas, 271 F. 2d 450 (C.A. 4th); Carlo v. United States, 286 F. 2d 841, 848-849

(C.A. 2d), certiorari denied, 366 U.S. 944.^{3/} Thus in order to recover the disputed funds it was incumbent upon the taxpayer to establish his non-liability for the tax involved. Welsh v. United States, supra; Field v. United States, supra; Simpson v. Thomas, supra; Carlo v. United States, supra.^{4/} This he did not do and, we submit, the District Court properly entered summary judgment against him.

B. The granting of the Government's Motion for Summary Judgment was correct according to law

The thrust of taxpayer's position on appeal is that the District Court erred in granting summary judgment where there remained unsettled the factual question of whether, as required by Section 4401, taxpayer was "engaged in the business of accepting wagers." (Emphasis supplied.) (Br. 4-8, 12.) Thus, he does not challenge the District Court's judgment as to the amount of the deficiency in issue, but the propriety of any determination of deficiency whatsoever. (Br. 5-6.)

^{3/} Taxpayer on July 9, 1964, moved for return of the money. (R. 192, Br. 3.) Based upon this authority, the District Court, on November 6, 1964, vacated its order of July 22, 1964, directing refund of the money. (R. 192-193.)

^{4/} Were it otherwise, these funds would receive an insulation offered no other property and in any event the property would be the proper subject of levy the instant released to the taxpayer. See, e.g., Field v. United States, supra. (R. 72-76.)

It is elementary that summary judgment is appropriate to give a speedy adjudication in cases which present no genuine issue of material fact and upon which the moving party is entitled to prevail as a matter of law. Rule 56(c), Federal Rules of Civil Procedure, Appendix, infra.

In determining the matter, resort is had to extrinsic facts, through affidavits, admissions and the like, in order to find out if there is a real issue. If these show that there is no issue, summary judgment will be granted despite the fact that the pleadings as they stand present such an issue. MacKay v. American Potash & Chemical Co., 268 F. 2d 512 (C.A. 9th); Byrnes v. Mutual Life Insurance Co. of New York, 217 F. 2d 497, 500 (C.A. 9th), certiorari denied, 348 U.S. 971.

In this case, the questions of what were the issues to be resolved by the District Court were determined by method of interrogatories and admissions. This is eminently correct and consistent with the purpose of discovery. United States v. Procter & Gamble, 356 U.S. 677, 682; Hickman v. Taylor, 329 U.S. 495, 499; Bell v. Swift & Co., 283 F. 2d 407 (C.A. 5th); Life Music, Inc. v. Broadcast Music, Inc., 41 F.R.D. 16, 25-27 (S.D. N.Y.)

The taxpayer served the Government with interrogatories on March 23, 1966, to which the Government filed answers on April 15, 1966.

(R. 11.) The Government served interrogatories upon the taxpayer. The pertinent history of the interrogatories served upon the taxpayer is well summed up by the District Court (R. 194-198):

XV

On December 12, 1966, the taxpayer answered the Government's interrogatories, to wit:

Interrogatory No. 3

"For the fiscal years 1962, 1963 and 1964, state with particularity every and all sources of your gross income."

Answer: "Betting and gambling."

Interrogatory No. 6

"For the fiscal years 1962, 1963 and 1964, if any of your gross income has been reported for tax purposes as derived from betting, state with specificity: a) the amount of each such bet; b) the subject matter of each such bet; c) the person or persons from whom you have received money as a result of such bets, including the telephone number and address of each."

Answer: "I do not recall any of the information requested in your question. I have no records which would enable me to do so. I kept my records on a daily basis and destroyed the same on each succeeding day."

XVI

By answers dated January 30, 1967, Mr. Ginsberg responded to interrogatories and requests for admissions served upon him by the Government, to wit:

Request for Admission No. 2

"The Federal Excise Tax assessment made against Mr. Ginsberg for wagering which is the subject of this lawsuit is a proper and correct assessment."

Response: "Deny."

Interrogatory No. 2

"If your answer to Request for Admission No. 2 is other than an unqualified admission, state with particularity what you find objectionable with the assessment."

Answer: "Said assessment does not accurately reflect the total volume on a net basis of plaintiff's activities."

XVII

This answer of January 30th prompted Government's counsel to file a new set of request for admissions and written interrogatories. They were answered by Mr. Ginsberg on February 6, 1967 as follows:

Interrogatory No. 2

"Your response to Interrogatory No. 2 filed with the Court on January 6, 1967, states that the assessment does not accurately reflect the total volume on a net basis of plaintiff's activities. With respect to the assessment, state with particularity:

"a. What you perceive the total volume on a net basis of plaintiff's activities to be."

Answer: "I have no opinion on that subject."

"b. Describe in detail every document upon which you rely to substantiate the total volume on a net basis of plaintiff's activities."

Answer: "None."

"c. The name and address of every witness which you intend to use at time of trial to disprove the accuracy of the Government's assessment against the plaintiff."

Answer: "I contend that the accuracy or not of the alleged assessment is not to be an issue at the trial of this case, and accordingly, I do not intend to offer evidence on the subject. If it is ruled to be an issue in the case, I will be the only witness for the plaintiff on the subject."

"d. Description of all other evidence which you intend to use in your case-in-chief at time of trial, not covered by your answers to Interrogatories 2(b) and 2(c) above shown, to disprove the accuracy of the Government's assessment against the plaintiff."

Answer: "I do not intend to offer documentary evidence on the subject."

XVIII

In response to further Government request for admissions and interrogatories, the plaintiff, on February 13, 1967, answered as follows:

Request for Admission No. 1

"The defendant's retention of the \$5,050.00 was a correct, proper, and lawful retention."

Response: "Deny."

Interrogatory No. 1

"If your answer to Request for Admission No. 1 is other than an unqualified admission, state with particularity all facts upon which you claim that said retention was improper or unlawful."

Answer: "Such money was not retained by defendant for any lawful, legitimate purpose other than to vex or harass the plaintiff; such retention did not have as its purpose the protection of the defendant's rights or the collection of taxes."

XIX

On March 6, 1967, the Government, through its counsel of record, Assistant United States Attorney Donald M. Fenmore, moved the Court for an Order compelling the plaintiff to further answer with particularity Interrogatory No. 2 filed on January 6, 1967, Interrogatory No. 2(a) and 2(d) filed on January 31, 1967, and Interrogatories Nos. 1 and 2 filed on February 8, 1967; and in the alternative, if the plaintiff be either unwilling or unable to respond to the interrogatories served upon him by stating facts rather than mere legal conclusions, that plaintiff's complaint then be dismissed with prejudice, and that a deficiency judgment be entered against the plaintiff on the Government's Counterclaim.

United States District Judge Warren J. Ferguson, in response to this Motion, ordered the plaintiff to " . . . serve and file a further and as complete an answer as he is capable to Interrogatory numbers 2(a) and 2(d) filed by the defendant on January 31, 1967."

XX

Plaintiff's "further answer" of March 7, 1967 in compliance with the Court Order was:

Interrogatory No. 2(a)

". . . State with particularity what you perceive the total volume on a net basis of plaintiff's activities to be."

Answer: "I don't know."

In view of the foregoing, the Government on March 15, 1967, filed motion for summary judgment. (R. 163-174.)^{5/} The Government's assessment, which was the heart of the matter, stood presumptively correct and, as a matter of law, the Government was entitled to judgment (including its counterclaim). United States v. Rindskopf, 105 U.S. 418, 422; United States v. Molitor, 337 F. 2d 917, 922-923 (C.A. 9th); Roybark v. United States, 218 F. 2d 164 (C.A. 9th); United States v. Lease, 346 F. 2d 696, 700 (C.A. 2d); O'Neill v. United States, 198 F. Supp. 367 (E.D. N.Y.). At no time in the

^{5/} Previously (Br. 6) and prior in time to the interrogatories' history above outlined, on July 1, 1966, the Government had moved for judgment on the pleadings (which would have been treated as a motion for summary judgment) on the grounds that the District Court's conclusions in the prior criminal trial as to the taxpayer's business activities, viz. (R. 29, 50-51), that their activities were insufficient for criminal conviction only because the requisite intent was lacking, were findings that were collaterally controlling for purposes of taxpayer's civil tax liability. The taxpayer having been acquitted, the District Court found the conclusions not here dispositive. The motion for summary judgment was denied. (R. 111-112.)

course of these comprehensive interrogatories did the taxpayer even suggest that his "betting and gambling" activities (supra) were not of the nature contemplated by Section 4401. At the time the interrogatories were served neither counsel nor taxpayer objected on the grounds that they were ambiguous. A reading certainly reflects the contrary. Each interrogatory was answered by taxpayer under oath. Even after court order to compel taxpayer to further answer the interrogatories as best and as complete as he was capable, taxpayer never once stated in his answer that the assessment was improper for the reason that he was not engaged in the business of accepting wagers. Only later, after judgment, ^{6/} did he suggest that the interrogatories "were ambiguous" and that he had answered "in * * * inadvertance and neglect" if he had "conceded by the answers * * * that I have engaged * * * in receiving or accepting wagers in a manner which would make me liable for the payment of the gambling excise tax." (R. 206.)

We submit that the taxpayer should not here be permitted to thwart the very real and significant role of the interrogatories in this (and every) case. Discovery was carried on "to obtain the fullest possible knowledge of the issues and facts before trial" (Hickman v. Taylor, 329 U.S. 495, 501) to clarify and narrow the basic issues (Hickman v. Taylor, ibid.; Bell v. Swift &

^{6/} See Point II, infra.

Co., 283 F. 2d 407 (C.A. 5th); Byrnes v. Mutual Life Insurance Co. of New York, 217 F. 2d 497, 500 (C.A. 9th), certiorari denied, 348 U.S. 971, and compare Life Music, Inc. v. Broadcast Music, Inc., 41 F.R.D. 16, 26 (S.D. N.Y.).

In addition, Rule 56(e), Federal Rules of Civil Procedure, Appendix, infra, specifically provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

And see S & S Logging Co. v. Barker, 366 F. 2d 617 (C.A. 9th).

The Government filed its motion for summary judgment on March 15, 1967, noticing the hearing for April 10, 1967, thus allowing taxpayer approximately 26 days in which to prepare. (R. 199.)

On March 21, 1967, the taxpayer filed a memorandum in opposition to the motion for summary judgment. This memorandum failed to contain any opposing affidavit as required by Rule 56(e), supra, and local court rules, nor did it contain any statement of genuine issues which would set forth all material facts as to which it contended there existed a genuine issue necessary to be litigated.

(R. 199.) The failure by taxpayer to articulate a single fact he felt was left in dispute was pointed out to the taxpayer and to the court by the Government's counsel in a reply memorandum filed March 28, 1967--13 days prior to the hearing date. As the District Court pointed up (R. 199):

Throughout this thirteen-day period, plaintiff still did not state for the Court any fact which he considered was left in dispute, nor did he do so during oral argument of the motion on April 10, 1967, or at any other time.^{7/}

Thus for taxpayer to argue that he has not been given his day in court hardly jibes with the facts of record and the position he takes seeks to subvert one of the most significant innovations of the Federal Rules of Civil Procedure, the pretrial discovery mechanism.

Taxpayer filed his complaint on December 30, 1965. Judgment was not entered until April 21, 1967--well over a year of difficult litigation. Ample opportunity was afforded taxpayer to raise any fact or issue. He raised none.

The court properly used the answers in the interrogatories to show no genuine issue of fact existed. It properly granted the Government's motion for summary judgment. Rule 56(e), Federal Rules of Civil Procedure; MacKay v. American Potash & Chemical Co., 268 F. 2d 512 (C.A. 9th); S & S Logging Co. v. Barker, supra; Alamo Theater Co. v. Loews, Inc., 22 F.R.D. 42 (N.D. Ill.)

^{7/} As set out more fully above, taxpayer stated that with respect to the validity of the tax assessment, he did not intend to offer any documentary evidence on the subject and that he didn't know what the volume of his activities was during the period in question.

II

THE TAXPAYER'S MOTION FOR RELIEF FROM JUDGMENT WAS ADDRESSED TO THE SOUND DISCRETION OF THE DISTRICT COURT AND WHERE THE RECORD CLEARLY SHOWED THAT TAXPAYER COULD NOT HAVE BEEN MORE ABLY REPRESENTED AND THAT PRIOR COUNSEL HAD COMMITTED NO ACT OF NEGLIGENCE OR ERROR, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING TAXPAYER'S MOTION

On June 2, 1967, taxpayer pursuant to Rule 60(b), Federal Rules of Civil Procedure, ^{8/} filed motion for relief from judgment based upon the alleged neglect or error by former counsel. ^{2/} He declared in his accompanying affidavit (R. 206):

I retained Marvin Zinman, attorney at law, to represent me in this action against the defendant for return of funds improperly levied upon as a result of an improper assessment made by the defendant.

In the course of the defense of the action, the Government propounded to me certain interrogatories and requests for admissions. On my former counsel's advice, I answered said interrogatories and requests for admissions in a manner which through inadvertance and neglect, gave the impression that I conceded the propriety of the filing of a return by the Government. All that was intended to be conceded by the answers was that I have engaged in gambling, not in receiving or accepting wagers in a manner which would make me liable for the payment of the gambling excise tax.

The interrogatories, the answers to which formed the basis for the order granting summary judgment, were ambiguous and referred to transactions which do not form

8/ Rule 60(b), Appendix, infra, provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * *

9/ Mr. Zinman was also taxpayer's counsel in the criminal proceeding. (R. 193.)

ARGUMENT

APPELLEES' ANSWERING BRIEF

ANSWER TO ASSIGNMENT OF ERROR No. 1

THE TRIAL JUDGE WAS NOT REQUIRED TO DISQUALIFY
HIMSELF.

POINT 1. Defendant Lenske previously
secured disqualification of one
trial judge and was not entitled
to seek disqualification of another.

28 U.S.C. sec. 144, governing disqualification of judges because of personal bias or prejudice, expressly provides "a party may file only one such affidavit [stating facts and reasons for the belief that bias or prejudice exists] in any case." The statute "imposes a bag limit of one judge for a party to disqualify by the character of motion under consideration here." Martin v. Texas Indemnity Ins. Co., 214 F.Supp. 477, 480 (N.D.Tex., 1962), unreported in F.2d, cert. den. 377 U.S. 971 (1964).

On April 21, 1967, defendant Lenske stated in open court he intended to file an affidavit of prejudice against Judge Kilkenny, and that judge thereupon disqualified himself and transferred the case to Judge Belloni. (Tr.-I, pp. 24-25, 34: TDE 4/21/67). On May 15, 1967, he filed an affidavit of prejudice against Judge Belloni. (TDE 5/15/67).

Defendant Lenske's securing disqualification of Judge Kilkenny without actually filing a formal affidavit should not frustrate the rule that litigants may seek disqualification because of alleged bias only once during a case. See United States v. Hoffa, 245 F.Supp. 772 (E.D.Tenn., 1965), affirmed 349 F.2d 20 (6th Cir., 1965), affirmed 385 U.S.293 (1966) (judge refused to disqualify himself where prior judge voluntarily had withdrawn after a legally insufficient affidavit was filed). Judge Kilkenny's withdrawal from the case was in direct response to defendant Lenske's assertion he would file the affidavit against him. He should not be allowed to remove two judges merely because his first target did not insist upon the formality of the affidavit.

The disqualification statute must be strictly construed "due to its nature and the opportunity for abuse of the privilege * * * ." Scott v. Beams, 122 F.2d 777, 788 (10th Cir., 1951), cert. den. 315 U.S. 809 (1942). Accord: Marquette Cement Mfg. Co. v. Federal Trade Commission, 147 F.2d 589, 592 (7th Cir., 1945). Having secured removal of Judge Kilkenny, defendant Lenske was not entitled, under the statute, to seek disqualification of Judge Belloni.

POINT 2. The attempt to disqualify the
trial judge was not timely.

The statute specifically requires a "timely" affidavit. "Nothing is more important in an affidavit than timeliness, and its counterpart, waiver." In re Union Leader Corp., 292 F.2d 381, 390 (1st Cir., 1961), cert. den. 368 U.S. 927 (1961). To avail himself of the statutory privilege, "the party concerned must complain promptly. He cannot be allowed to wait to see how the judge decides." Pacheco v. People of Puerto Rico, 300 F.2d 759, 760 (1st Cir., 1962).

Defendant Lenske knew of the assignment to Judge Belloni on April 21, 1967. (Tr.-I, pp. 33-34). Although trial was scheduled for the morning of May 16, 1967 (see Tr.-I, p. 2), he failed to file his affidavit until the day before. (TDE 5/15/67). Nothing explains or justifies the delay. C.f., Scott v. Beams, supra, 122 F.2d at 788, holding that the affidavit "must show a proper excuse for the delay."

The affidavit does not state defendant Lenske became aware of Judge Belloni's purported prejudice after the case was assigned to him. Moreover, it affirmatively asserts that a principal cause of the supposed bias, the so-called adverse newspaper, television and radio publicity, existed as far back as July, 1962 and lasted until March, 1967. (R, 64). Defendant Lenske's own recitations show his affidavit could have been filed promptly after reassignment of the case and, in all events, earlier than one day before trial. In these circumstances the affidavit was not timely. See Faubus v. United States, 254 F.2d 797, 804 (8th Cir., 1958), cert. den. 358 U.S. 829 (1958)(disqualification refused where all events cited in affidavit took place before September 10, and affidavit not filed until September 19, the day before scheduled hearing); Scott v. Beams, supra, 122 F.2d at 788 ("it must be filed with reasonable promptitude after the disqualifying facts are known").

POINT 3. The affidavit was legally
insufficient.

Mere filing of an affidavit does not automatically disqualify a judge, for it must be legally sufficient. Berger v. United States, 255 U.S. 22, 32, 36 (1921); Price v. Johnston, 125 F.2d 806, 811 (9th Cir., 1942), cert. den. 316 U.S. 677 (1942). The statute requires statement of "the facts and the reasons for the belief that bias or prejudice exists * * * ." There is need of "'more than mere conclusions * * * ." United States v. Bell, 351 F.2d 868, 879 (6th Cir., 1965), cert. den. 383 U.S. 947 (1966).

Assuming arguendo that, as alleged in the affidavit, defendant Lenske was indicted in federal court, that the Oregon State Bar proceeded against him, that news media carried publicity adverse to him, that the Bar sent unfavorable and unjust statements about him to Oregon's judges and that he was the subject of frequent judicial discussion, he failed to state facts indicating bias of Judge Belloni. There were no allegations this judge personally was aware of or involved in these matters; nor was there statement of reasons why he was prejudiced. It certainly does not follow that all judges hearing or seeing adverse comment about a litigant are going to be prejudiced against him. Compare United States v. Bell, supra at 877, observing that "the mere recitation of this publicity did not per se give the defendant a right to a continuance or a change of venue."

In order to disqualify a judge, the affidavit must show the bias is personal. Ferrari v. United States, 169 F.2d 353, 355 (9th Cir., 1948); Price v. Johnston, 125 F.2d 806, 811 (9th Cir., 1942), cert. den. 316 U.S. 677 (1942). Having failed to allege any act or statement on the part of Judge Belloni which even remotely could be construed as indicating his

personal prejudice, the affidavit was legally insufficient to warrant disqualification. Price v. Johnston, supra, 125 F.2d at 811 (affidavit insufficient because "statute requires that the bias or prejudice be 'personal.'").

ANSWER TO ASSIGNMENT OF ERROR No. 2

THERE WAS NO ERROR EITHER IN REFUSING TO HOLD FURTHER PRETRIAL CONFERENCE OR IN REFUSING TO RE-SET THE TRIAL DATE.

POINT 1. Defendant Lenske deliberately
and voluntarily absented himself
from scheduled pretrial conferences
after receiving due notice thereof.

In March, 1967 a "firm date of April 24" was set for pretrial conference before Judge Kilkenny (Tr.-I, p. 33; TDE 3/27/67), but, with defendant Lenske's approval, it was changed to April 21, 1967. (Ibid). On that date, defendant Lenske appeared in Court (ibid); he promptly requested Judge Kilkenny's removal, and the case was reassigned to Judge Belloni for pretrial conference on April 24. (Tr.-I, p. 34; TDE 4/21/67). Defendant Lenske admits the Judge "was positive regarding the setting then * * * ." (Tr.-I, p. 26). On Sunday, April 23, defendant telephoned the Clerk from California, where he was vacationing, to advise that he would not appear for pretrial conference the next day. (Tr.-I, p. 34).

Mr. Lenske did not appear at pretrial conference known by him to be set for April 24. (Tr.-I, p. 27).

Pretrial conference was rescheduled for April 28. (Tr.-I, p. 35;

TDE 4/24/67). Notice of the date was sent to the parties (ibid), and defendant Lenske admits having received it (Tr.-I, p. 21), but he did not attend. Even if it is true he did not see the notice until the afternoon of April 28, after the morning pretrial conference, his absence should be deemed voluntary:

First. Had he attended court on April 24, rather than knowingly and deliberately leaving the state on vacation, there would have been no need to reschedule pretrial conference for April 28. Any alleged error in proceeding without him was therefore invited. "[C]ounsel may not invite error and then complain of it * * * ." Capella v. Zurich General Acc. Liability Ins. Co., 194 F.2d 558, 560 (5th Cir., 1952).

Second. It is manifest he would attend court at his whim and did not care whether pretrial conference was held on April 24, April 28 or any other date. He was content to forward a memorandum, which the Clerk delivered to Judge Belloni's clerk on April 24. (Tr.-I, p. 34). True, due process normally includes the right to be heard at hearings.

"But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may

be taken to have of the
consequences of his own
conduct." Link v. Wabash
R. Co., 370 U.S. 626, 632
(1962).

It is undisputed he was told by the Clerk that the court probably would proceed without him if he were absent on April 24 and that his absence would be at his own hazard. (Tr.-I, p. 34). Since, in those circumstances, it undoubtedly would have been proper for the court to conduct pretrial conference on April 24 without defendant Lenske, it should be immaterial whether the court similarly proceeded on April 28, especially since the absence was a continuation of the initial willful departure. See Smith v. Stone, 303 F.2d 15, 18 (9th Cir., 1962), where this Court observed:

"Counsel for litigants, no matter how
'important' their cases are, cannot
themselves decide when they wish to
appear, or when they will file those papers
required in a law suit. Chaos would
result. 'Attorneys should make an
attempt to conform to the rules and not
try to improvise new practice.'
[citation omitted]. There must be
some obedience to the rules of court;
and some respect shown to the conven-
ience and rights of other counsel, litigants
and the court itself."

Third. Notification of the April 28 pretrial conference by means

of postal card notice was standard operating procedure of the Clerk's office. (Tr.I, p. 32). If defendant Lenske did not make arrangements to have it forwarded to him during his absence, that is his fault, not the Clerk's. Litigants are obliged to take notice of "the local rules governing assignment of cases, and to keep in touch with the progress of the case themselves, or through a local attorney." Janousek v. French, 287 F.2d 616, 622 (8th Cir., 1961). Compare Opinion No. 130, Oregon State Bar (1963) (an attorney "must be in a position to be contacted * * * by the courts" and violates his responsibilities as a lawyer if he "cannot be reached within a reasonable time by * * * courts * * *").

In these circumstances defendant Lenske has no legitimate complaint. Since, as held in Link v. Wabash R. Co., 370 U.S. 626 (1962), the trial court has the right to dismiss an action sua sponte for failure of plaintiff's counsel to appear at pretrial conference when the case previously has been delayed,¹ it was not unreasonable for the court to proceed in his absence. Compare 3 Moore, Federal Practice para. 16.07, p. 1110 (2d ed., 1964) (noting that failure to appear at pretrial conference is justification for

¹This case, too, had been delayed. The original complaint was filed in June, 1965. (TDE 6/9/65). The first pretrial conference between defendants was not held until December 5, 1966 (TDE 12/5/66), followed by further pretrial conference on December 12, 1966. (TDE 12/12/66). On December 27, 1966, the parties were "placed under the rule" (TDE 12/27/66), which, under local practice, requires strict adherence to the time schedules of Local Rule 34. Perhaps this Court would take note that litigants customarily are placed under the rule only when the case has been unduly delayed and the court becomes satisfied that less formal procedures have not resulted in expeditious case administration. After the parties filed a supplemental proposed pretrial order and contentions (TDE 3/10/67, 3/16/67), the court set further pretrial conference for April 24 (TDE 3/27/67), and trial was set for the week of May 15. (TDE 3/27/67). The plan was to try the case almost two years after it began.

entry of default); Smith v. Stone, 308 F. 2d 15 (9th Cir., 1962) (affirming summary judgment against plaintiff where his counsel failed to attend hearing or to file required papers).

POINT 2. Defendant Lenske waived any
objection by failing to seek
timely relief.

Defendant Lenske knew of the April 28 pretrial conference no later than the afternoon of that day (Tr.-I, p. 22), but did not file a motion seeking further pretrial conference until May 12 (TDE 5/12/67), two weeks after the hearing and only four days before trial. For some reason he did not serve the motion on opposing counsel until the day before trial. (See Tr.-I, p. 27). Neither did he even attempt, between April 28 and May 15, to seek opposing counsel's consent to further hearing on matters he wanted to bring up at further pretrial conference. (Ibid).

The delay is inexplicable since defendant Lenske told the Clerk on April 28 he intended to file the motion and, at Lenske's request, special arrangements were made to accept it for filing on Saturday, April 29, a day the Clerk's office normally is closed. (Tr.-I, p. 35).

Even if the motion for further pretrial conference be regarded as a motion for relief under Rule 60 (b), Fed.R.Civ.Proc., that rule clearly requires the motion to be "made within a reasonable time," which is a matter "to be decided under the circumstances of each case." Delzona Corp. v. Sacks, 265 F.2d 157, 159 (3rd Cir., 1959). In view of the delay already encountered (see footnote 1, page 13 supra), the wilfullness of defendant Lenske's absence and the fact there was no legitimate reason for waiting

nearly to the eve of trial, the trial judge should not be found to have abused his discretion in the circumstances.

POINT 3. Defendant Lenske was not
prejudiced by pretrial pro-
cedure nor by adherence to the
scheduled trial date.

As observed by the trial judge (Tr.-I, p. 37), everything possible was done to protect defendant Lenske's interests in formulating the final pretrial order. At the April 28 pretrial conference, the court "required [Knutsens' counsel] to make a rather convincing presentation" even on proposed questions of fact and law which "seem[ed] obvious" to the court. (Ibid).

It is impossible to know with certainty what defendant Lenske would have argued had he bothered to show up. Assuming, arguendo, he would have raised the points set forth in pages 12 and 13 of his brief, the obvious answer is that, as shown in "Answer to Assignment of Error No. 5," pages herein, his positions are incorrect as a matter of law. He could not possibly be prejudiced by formulation of a pretrial order which set forth factual and legal issues which were appropriate under the law and which omitted matters inappropriate.

We call to the Court's attention the further fact that the trial judge allowed amendment of the pretrial order on the first day of trial by permitting inclusion of defendant Lenske's statute of limitations defense. (Tr.-I, p. 17). The extreme leniency of the court in having done so becomes apparent when it is recalled that the last pleading of the Knutsens was filed

in August, 1966 (TDE 8/5/66) and that defendant Lenske never raised the issue until May 15, 1967, the day before trial. (Tr.-1, pp. 13-14; TDE 5/15/67).

A litigant is not prejudiced when, as here, all deliberate effort is made to cast the pretrial order fairly and, as here, the order properly formulates the issues to be decided.

In view of the foregoing it was proper to adhere to the May trial date which had been scheduled in March. (Tr.-I, p. 33; TDE 3/27/67). A trial court "has broad discretion in the making of trial assignments and in holding parties to assignments reasonably made in the absence of valid grounds for continuance." Janousek v. French, 287 F.2d 616, 623 (8th Cir., 1961). There was no showing here why defendant Lenske could not go to trial on a date long-scheduled.

ANSWER TO ASSIGNMENT OF ERROR NO. 2 1/2

THERE WAS NO ERROR IN REFUSING TO ADMIT EXHIBIT 120.

Defendant Lenske's brief cites neither authority nor reason for his contention that refusal to admit Exhibit 120 was erroneous. Rejection of the document was proper for the following reasons:

First. It was irrelevant. The document was a copy of a contract of sale between Knutsens and people named Crawford, and it would tend neither to prove nor disprove any issues germane to the case. Defendant Lenske's stated purpose for introducing the exhibit was to impeach Knutsen's recollection that the contract price was \$12,500 rather than \$11,500. (Tr.-I, p. 110). Impeachment on collateral or immaterial matters is not permitted.

State v. McKiel, 122 Or. 504, 510, 259 Pac. 917 (1927).

Second. The exhibit was a copy (Tr.-I, p. 110) and, therefore, could not be admitted under the best evidence rule. ORS 41.610, 41.640.

Third. Paragraph VII of the Final Pretrial Order (R 67 at 72) and Local Rule 36, set out in Appendix "A," both required the parties jointly to identify and mark exhibits prior to trial, but, despite written request, the existence of which defendant Lenske never denied, he failed to meet with Knutsens' counsel for that purpose. (Tr. -I, pp. 110, 117).

ANSWER TO ASSIGNMENT OF ERROR No. 3

DEFENDANT LENSKE WAIVED HIS RIGHT TO JURY TRIAL.

The only issue triable by a jury timely demanded would have been Knutsens' claim for damages. All other issues concerned the parties' respective rights to title to real property and were equitable. Compare Johnson v. Gardner, 179 F.2d 114, 117 (9th Cir., 1949), cert. den. 339 U.S. 935 (1950), holding that suit to set aside deed because of fraud is equitable and there is no right to jury trial.

The damage claim was raised both by Knutsens' first and second amended answers and cross-claims, filed respectively on June 15 and August 5, 1966. (TDE 6/15/66, 8/5/66). Defendant Lenske's answer and cross-claim was filed August 15, 1966. (TDE 8/15/66). Since these were the last pleadings directed to the only issue triable by jury, and since defendant Lenske did not demand a jury until May 12, 1967 (TDE 5/12/67), there was total failure to comply with Rule 38 (b), Fed. R. Civ. Proc., which expressly requires

written demand for jury not later than ten days after service of the last pleading directed to the issue.

Failure to make timely demand resulted in waiver of right to jury. Rule 38 (d), Fed. R. Civ. Proc.; Tomlin v. Pope & Talbot, Inc., 282 F.2d 447, 448 (9th Cir., 1960).

Denial of defendant Lenske's motion was within the discretion of the trial court, id. at 449, and, as this Court approvingly has noted,

"the view has been stated that as a matter of judicial administration discretion ought rarely to be exercised to grant a trial by a jury in default of a timely request for it."

Ibid.

"[A]ppellate courts normally refuse to interfere" in these matters. Ibid. Particularly in this case, where demand for jury did not come until virtually the eve of trial, denial of relief from the waiver was proper. Compare McGowan v. United States, 296 F.2d 252, 256, n.7 (5th Cir., 1961).

ANSWER TO ASSIGNMENT OF ERROR No. 4

THE STATUTE OF LIMITATIONS DID NOT RUN.

POINT 1. Insofar as Knutsens sought to recover title to the property, the applicable statute of limitations provided for suit within ten years.

Knutsens' first cross-claim sought determination of their right to title to their farm as against defendants Lenske and Heddon. Under Oregon law the period of limitations was ten years. ORS 12.040(1) and 12.050. See Appendix "B."

True, one of the grounds for recovery of title was fraud. But the ten-year statute of limitations for recovery of title to real property, not the shorter period governing an action for fraud, nevertheless controls. See First National Bank v. Buckland, 128 Or. 242, 247, 273 Pac. 393 (1929). In all events, recovery of title also was predicated on lack of consideration for the deed. (Paragraph IV, Second Amended Answer and Cross-claim -- R 29; Knutsen Contention No. 3, Final Pretrial Order -- R 67). Findings of Fact No. 4 through 7 (R 77) were sufficient to establish Knutsens' right of recovery for these reasons which have nothing necessarily to do with fraud.

POINT 2. Knutsens' damage claim
was not barred by the
statute of limitations be-
cause they did not know of
defendant Lenske's fraud more
than two years before suit.

Oregon's general statute of limitation for actions based on fraud is two years, ORS 12.110 (1), but it is expressly provided that the limitation commences only from discovery of the fraud. Ibid; ORS 12.040(4). Both statutes are set forth in Appendix "B."

Finding of Fact No. 10, (R 77) that the Knutsens "did not discover or have reason to discover the fraud practiced upon them until 1965," means

that the second amended cross-claim, filed on August 5, 1966 (TDE 8/5/66), was timely. (Indeed, by reason of Rule 15 (c), Fed. R. Civ. Proc., the damage claim properly relates back to the original cross-claim of April, 1966. TDE 4/15/66).

This Court is bound by Rule 52(a), Fed. R. Civ. Proc. which requires that "findings of fact shall not be set aside unless clearly erroneous * * *." Lundgren v. Freeman, 307 F.2d 104, 113 (9th Cir., 1962).

In attacking the finding, defendant Lenske's brief makes much of the facts that Knutsen received a letter from Farmers Home Administration in May, 1962, advising that the property had been deeded to the Heddons, and that, shortly before May, 1963, Knutsen asked him for return of the property. The trial court properly concluded that such facts did not put Knutsens on notice of fraud for the following reasons:

First. The F.H.A. letter, of course, was no notice of Lenske's fraud of Knutsen because Knutsen knew that, at Lenske's suggestion, the property was supposed to be deeded to "a fictitious" person or straw-man. (Tr.-I, pp. 49, 62). Indeed, when he saw the letter, Knutsen "assumed then, and for quite some time after that, that the Heddons were the fictitious party that Mr. Lenske suggested * * *." (Tr.-II, p. 137). There was no reason for the letter to excite suspicion because its contents merely confirmed that Lenske had put into action the plan he suggested to his client.

Second. The Lenske-Knutsen conversation in May, 1963 did not involve a demand for return of title; it was a mere request. (Tr.-I, p. 64). Moreover, defendant Lenske did not refuse reconveyance at that time or otherwise indicate he would not comply; instead, he said he "would look into it." (Ibid). Lenske never denied this evidence. (See his testimony, Tr.-II, pp. 234-67).

22

The evidence supports the trial court's finding that there was no reason to know of the fraud until 1965. Knutsen testified that the next conversation he had with defendant Lenske regarding return of title was in January, 1965. (Tr.-I, pp. 57-58). On that occasion Lenske "either said he wouldn't or couldn't * * * ." (Id. at 58). None of this testimony was denied by defendant Lenske when he took the stand. (Tr.-II, pp. 234-67).

Knutsen's testimony is partially corroborated by Lenske's admission that they only discussed the matter twice -- once "during the Crawford period," presumably referring to 1963, and again when the United States Attorney's office insisted on reconveyance by Heddon. (Tr.-II, p. 256). Since the first conversation, as noted, was left on the basis that the Knutsens' attorney would look into the matter of a reconveyance, the client's first occasion to fear that something was wrong necessarily would have been when he later was told either that reconveyance could not or would not be effected.

Substantial corroboration of the court's finding and of Knutsen's testimony is in the fact that when Lenske declined reconveyance "that's when I stopped making payments on the property. That was the last payment I made on the property." (Tr.-I, p. 58). Exhibit 104, receipts from F.H.A., confirms that the last payment was on January 8, 1965. The reason for such cessation was obvious:

"Q. Why did you cease making payments at that time, sir?

"A. Because I was certain in my own mind that Mr. Lenske wasn't going to give me back title to the property, and I couldn't see paying -- I had the mortgage and Heddon's had the property in their name, and I would be just buying property for

them." (Tr.-I, p. 59).

If the 1963 conversation with his attorney, Lenske, had been such to cause Knutsen, the client, to suspect fraud, it seems logical he would have done then what he did when he finally realized in 1965 what was happening, namely, cease payments so as not to continue building the wrongdoers' equity in the property.

It no doubt is true that the statute of limitations commences to run when a person is put on reasonable notice he has been defrauded; he does not have to have proof to point of demonstration. But, in this case there was every reason for Knutsen not to have been suspicious of defendant Lenske in 1963. (Tr.-I, pp. 64-65). After all, Lenske was Knutsen's attorney (Tr.-I, pp. 50-51) and acted as such over a period of years. (Tr.-I, p. 100). Knutsen never previously had an attorney. (Tr.-I, p. 47). There would be no reason at all for a client to fear, when his attorney says he will look into a matter, that the attorney was in the process of defrauding him. In view of the conventional notion that one's attorney can be trusted, defendant Lenske's implicit suggestion to the contrary is extraordinary.

Furthermore, when we consider the 1965 refusal to reconvey, it becomes apparent that defendant Lenske's 1963 statement he would look into a reconveyance clearly was an attempt to lull his client into a false sense of security. As noted, defendant Lenske did not deny these reassurances at trial. Indeed, if his testimony is to be believed, he continued as late as the 1965 meeting with his client to urge Knutsen to tell FHA and the United States Attorney's office "that there would be no problem involved so far as the property being reconveyed from the Heddons to him at the appropriate time, but in the meantime, it would have no bearing upon his continuance of occupancy, using it for farm purposes and making the payments." (Tr.-II, p. 251)

Lulling reassurances, especially from attorney to client, properly can be presupposed to outweigh the fact that the property was not promptly reconveyed upon first request. Compare Equitable Life & Casualty Ins. Co. v. Lee, 310 F.2d 262, 270 (9th Cir., 1962), where this Court affirmed the finding that, for purposes of the statute of limitations, there was no reason to know of fraud in view of reassurances by defendant's agent.

Given that the conveyance to the Heddens was pursuant to plan suggested by attorney Lenske; that, when reconveyance initially was requested, he assured Knutsen he would look into the matter; that Lenske claims to have reassured reconveyance as late as 1965 and that Knutsen properly should have nothing but the utmost confidence in his attorney, it is only reasonable that the trial court found as fact that there was no reason to know of the fraud until 1965. Notwithstanding defendant Lenske's contention that the evidence should be construed to show Knutsen's knowledge of Lenske's fraud as far back as 1962 or 1963, "we think that it would be for the trial court to consider its weight, as it considered the question of fact here involved" Hurley v. Southern California Edison Co., 183 F.2d 125, 130 (9th Cir., 1950)(affirming finding there was no reason to know of fraud in face of conflicting evidence).

There was no error in finding and concluding that the statute of limitations had not run.

ANSWER TO ASSIGNMENT OF ERROR No. 5

THERE WAS NO ERROR IN EXCLUDING FROM THE PRETRIAL ORDER CONTENTIONS OF DEFENDANT LENSKE IMPROPER UNDER APPLICABLE LAW AND/OR OTHERWISE WAIVED BY HIM.



INTRODUCTION

In Assignment of Error No. 5, defendant Lenske urges that the trial court erroneously excluded from the final pretrial order certain of his contentions. Before answering his argument, we call to the Court's attention that his fundamental contentions that Knutsen knowingly conveyed the property to the Heddens so that it could not be subjected to a lien for a greater amount of child support payments than Knutsen's ex-wife agreed to accept and so that it could serve as security for alleged fees and advances both were included in the pretrial order. Lenske admits that. (Lenske Br., 12).

POINT 1. The trial court properly
exercised jurisdiction over
Knutsens' first cross-claim.

The complaint filed by the United States sought foreclosure of the interests of Knutsens, Lenske and Heddon in certain real property, all of whom were named defendants. (R-1, particularly paragraphs 9, 10 and 12 and paragraph 4 of prayer for relief). Jurisdiction over the complaint was predicated on 28 U.S.C. sec. 1345, and defendant Lenske apparently concedes it was well founded. (Lenske Br., 2).

As will be discussed presently, Knutsens' cross-claims were brought under Rule 13(g), Fed. R. Civ. Proc. The first point to be made, however, is that if, as we contend, the cross-claims were of a type within the ambit of Rule 13(g), there was jurisdiction over the subject matter even though, as Lenske contends, he and the Knutsens both were citizens of Oregon. The rule recognized and applied in Glens Falls Indemnity Co. v.



United States ex rel. Westinghouse Electric Supply Co., 229 F.2d 370, 373-74 (9th Cir., 1956) is that jurisdiction over the subject matter of the original complaint "includes the power to adjudicate all matters ancillary to the particular subject matter" and that if a cross-claim properly comes within the limitations of Rule 13(g) and if there is jurisdiction over the original complaint "no independent basis of jurisdiction for the cross-claim * * * need be alleged or proved." This Court expressly followed the rule in L & E Co. v. United States ex rel. Kaiser Gypsum Co., 351 F.2d 880, 882 (9th Cir., 1965).

Since there need be no independent basis of jurisdiction over the cross-claim by way of diversity of citizenship or otherwise as long as the cross-claim came within Rule 13(g), the critical question is whether the Knutsen cross-claim did so. Rule 13(g) provides in relevant part:

"(g) CROSS-CLAIM AGAINST CO-PARTY.

A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action."

Since the United States sought to foreclose its mortgage on specified property, there should be no doubt that the cross-claims necessarily were ones "relating to any property that is the subject matter of the original action."

Knutsens' first cross-claim, seeking determination of their right to title as against co-defendants Lenske and Heddon, even has judicial precedent antedating the Federal Rules. See Mathis v. Ligon, 37 F.2d 635



(10th Cir., 1930), reh. den. 39 F.2d 455 (10th Cir., 1930). In that case plaintiff brought suit to cancel a deed running from the State of Oklahoma to defendant Mathis. 37 F.2d at 635. The Court of Appeals upheld Mathis' cross-claim against his co-defendants wherein he sought to establish validity of the deed as between him and the co-defendants.

Regardless of that precedent, the 1946 amendment to Rule 13(g), adding the language sanctioning cross-claims "relating to any property that is the subject matter of the original action," seems specially to have been designed to take care of situations such as existed here. The Note of the Advisory Committee on the Federal Rules pointed out:

"The amendment is to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien." Quoted at 3 Moore, Federal Practice, para. 13.01, p. 7 (2nd ed., 1964)

Knutsen was in substantially the same situation as the second mortgagee referred to by the Advisory Committee. Like the junior lienor, he was made defendant to a suit of foreclosure and desired to assert a claim against co-defendants establishing that, with respect to the precise land involved in the original complaint, his rights were superior to those of the co-defendants.

The practical necessity of allowing a defendant to a foreclosure proceeding to litigate his right to title as against a co-defendant becomes apparent when it is remembered that the very nature of a foreclosure proceeding requires such determination:

First. It was necessary to determine the right to overplus, if any, resulting from judicial sale of the mortgaged property. ORS 88.080 requires that "a decree of foreclosure shall order the mortgaged property sold." The government's foreclosure decree, which shows on its face that it was stipulated to by defendants Knutsen and Lenske, properly provided that any overplus of sale proceeds "be paid to the Clerk of this Court for the benefit of the defendants above named as their interest may appear." (R-42 at 43).

Second. It was necessary to determine, as between defendants, who had the right of redemption. ORS 23.560(1) provides in relevant part:

"The mortgagor or judgment debtor whose right and title were sold, or his heir, devisee or grantee, who has acquired by inheritance, devise, deed, sale, or by virtue of any execution or by any other means, the legal title to the property sold, may, at any time within one year after the date of sale, redeem the property; * * * ."

The decree appropriately recognized the right of redemption. (R-42 at 44). Without determination of the relative rights of Knutsens, Lenske or Heddon, it would have been impossible to know which of them was entitled to seek redemption.

The self-evident purpose of Rule 13(g) is "to avoid circuitry of action and to dispose of the entire subject matter arising from one set of facts in one action, thus administering complete and even handed justice expeditiously and economically. [The rule is] remedial and should be liberally construed." Blair v. Cleveland Twist Drill Co., 197 F.2d 842, 845 (7th Cir., 1952). Given a situation where a foreclosure decree necessarily

must provide for sale of the mortgaged property, it only makes sense that co-defendants to the foreclosure suit be allowed to litigate in that proceeding any outstanding questions of their relative rights to title, for otherwise it is impossible to know which of them is entitled to enjoy the right to overplus and the right of redemption, both of which are necessary concomitants of the principal decree itself.

In these circumstances, Knutsens' proceeding by cross-claim to establish their title as against co-defendants not only came within the literal requirements of Rule 13(g), but within its manifest purpose as well.

POINT 2. The trial court properly exercised
jurisdiction over Knutsens' second
cross-claim.

Defendant Lenske contends, however, that even if the trial court had jurisdiction over the cross-claim seeking recovery of title, it should have confined itself to that issue and not entertained the second cross-claim which sought damages. (Lenske Br., 12).

One justification of the damage cross-claim is that, within the meaning of Rule 13(g), it arose "out of the transaction or occurrence that is the subject matter * * * of the original 'action' * * * ." This may seem startling at first, because of a natural tendency to assume that Knutsen's having given a note and mortgage to F.H.A. was the transaction which was the subject of the original complaint. It must be remembered, however, that:

"'Transaction' is a word of flexible meaning.

It may comprehend a series of many occurrences, depending not so much upon the

immediateness of their connection as
upon their logical relationship."

Moore v. New York Cotton Exchange,
270 U.S. 593, 610 (1926).

Moreover, since the test of the same "transaction or occurrence" under Rule 13(g), is identical with the test under Rule 13(a), Benson Mfg. Co. v. Bell Telephone Co., 35 FRD 29, 33 (E.D.Pa., 1964), it is pertinent to recall this Court's observation that "in deciding what is a transaction, we take note that the term gets an increasingly liberal construction" and that "two bundles of facts seldom are identical for comparing 'transactions' * * * ." Albright v. Gates, 362 F.2d 928, 929 (9th Cir., 1966)(allowing defendants in slander action to counterclaim not only against plaintiff, but to bring in additional defendants to the counterclaim on theory that the counterclaim, seeking damages and rescission of sale of securities, arose out of same transaction which was the subject of the alleged slander).

With these interpretations of "transaction or occurrence" in mind, we suggest that in this case the "occurrence that is the subject matter * * * of the original action," within the meaning of Rule 13(g), was Knutsens' default by failing and refusing to make payments to F.H.A. The complaint clearly alleged that "defendants Magner Dale Knutsen and JoAnne Click have violated the terms of said promissory note and of said mortgage in that they have failed, refused and neglected to pay the installments on said note * * * ." (R-1, at 2, para. 6). But for such failure there would have been no cause of suit. The undisputed evidence was that Knutsen wholly stopped making payments to F.H.A. in January, 1965, immediately after Lenske told him he either could not or would not reconvey, and that the reason for cessation of payments was Knutsen's unwillingness to be buying property for the man

who, he discovered, had defrauded him. (See page 21, supra).

We therefore submit that when the occurrence which is the subject matter of the original complaint is default in making loan payments, and when such default directly results from a co-defendant's fraud, there is sufficient connection between the two to render it entirely proper under Rule 13(g), to cross-claim against the co-defendant for damages resulting from fraud.

It also is proper to sustain the damage cross-claim by reason of the fact that, within the meaning of Rule 13(g), it was one "relating to any property that is the subject matter of the original action." The damage claim "related to" the property which was the subject of the government's complaint because it was based upon fraudulent deprivation of title to that property.

There is no reason, as defendant Lenske's brief suggests, to construe the "relating to any property" clause of Rule 13(g) as limiting the court's power to determination of interest in the property:

First. The draftsmen of the 1946 amendment clearly anticipated that, in addition to determining co-defendants' relative rights to property, the courts were to be enabled to award money judgments. Thus, the Advisory Committee's note on the amendment states that its purpose was to allow persons such as a second mortgagee "to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien." Quoted in 3 Moore, Federal Practice, para. 13.01 p. 7 (2nd ed., 1964)(Emphasis supplied). If a second mortgagee is able to secure "a personal judgment" when the property may well have stood only as partial security for the co-defendant's debt giving rise to the judgment, we submit that it is proper to allow a party to secure a personal judgment



when the co-defendant's fraudulent manipulation of that property is the sole cause for the judgment.

Second. Restriction of cross-claims only to adjudication of interests in the subject property flies in the face of what we assume to have been deliberate use of the phrase "relating to." Had the Advisory Committee or the Supreme Court intended to promulgate a rule as narrow as that for which defendant Lenske contends, all they had to do was say so.

Third. Rejection of the second cross-claim would be wholly at variance with the purpose of Rule 13(g) which, among other things, was intended "to avoid circuity of action * * *," Thomas v. Malco Refineries, Inc., 214 F.2d 884, 886 (19th Cir., 1954) and to provide for expeditious and economical administration of justice. Blair v. Cleveland Twist Drill Co., 197 F.2d 942, 945 (7th Cir., 1952). Compare this Court's statement that the purpose of the companion Rule 13(a) "is to prevent multiplicity of litigation and to bring about prompt resolution of all disputes arising from common matters." Local Union No. 11, I.B.E.W. v. G. P. Thompson Electric, Inc., 363 F.2d 181, 184 (9th Cir., 1966). With the limited exception that there had to be proof of the quantum of damages, and that certainly was not a complex matter, every fact necessary to establish the second cross-claim was proved during establishment of the first cross-claim. Since, as observed at page 27, supra, practical necessity required Knutsens to assert their first cross-claim, it would be unmitigated waste of time, effort and money to force them into state court on their second claim where they would have to relitigate all the issues of the first claim.

"Our courts should be vitally concerned
to see to it that disputes between
parties be resolved in as few lawsuits

as possible in as few courts as possible."

Shelley v. The Maccabees, 191 F.Supp.

742, 746 (E.D.N.Y., 1961).

Fourth. A corollary to the third point is that, having brought their first cross-claim, the Knutsens may well have been required to assert in the same proceeding their second cross-claim lest they be held to waive it. Relatively recently the Supreme Court recalled "'the whole tendency of our decisions * * * to require a plaintiff to try his * * * whole case at one time * * *.'" United Mine Workers v. Gibbs, 383 U.S. 715, 726, n.13 (1966). Both claims arose from the same set of facts, and for that reason it certainly would not be surprising that if the second claim had been brought in the state court defendant Lenske could have argued with some force that causes of action had been split.

POINT 3. The trial court had
jurisdiction to award
exemplary damages.

One point urged by defendant Lenske in support of Assignment of Error No. 5 is that "the court has no jurisdiction to determine the issue of punitive damages." (Lenske Br., 13). There is no argument or citation of authorities. It usually is unsafe to guess what opposing counsel has in mind, but lack of appellees' opportunity to respond to further elucidation of the point in appellant's reply brief prompts us to note that a similar point is made under Assignment of Error No. 6. At page 14 of his brief, defendant Lenske argues that equity courts may not award exemplary damages. If that is what he meant by the assertion there was lack of "jurisdiction" to do so, we elect to respond here.

Choice of Governing Law

It is first necessary to decide whether federal or state law will determine the existence or non-existence of "jurisdiction" to award exemplary damages. The statement by this Court that Rule 2, Fed.R.Civ.Proc., providing for "one form of action," does not abolish "the substantive distinction between law and equity," Straley v. Universal Uranium and Milling Corp., 289 F.2d 370, 373 (9th Cir., 1961)(emphasis supplied), might initially raise the thought that, in view of cases such as Erie Railroad v. Tompkins, 304 U.S. 64 (1938), determination of the supposed "jurisdiction" issue must be made with reference to Oregon law. However, the ultimate question here is whether a specific type of legal relief -- exemplary damages -- will be denied merely because the claimant also sought equitable relief. That is a question, we submit, which is governed by federal law.

First. If we are correct, as discussed under the heading "The Federal Rule," infra, that the Federal Rules of Civil Procedure do not permit denial of exemplary damages merely because equitable relief also was sought and granted, there can be no doubt that such federal law would govern. This, we suggest, is the clear teaching of Hanna v. Plumer, 380 U.S. 460 (1965). That case admonishes all federal courts that, given a situation covered by the Federal Rules, but which seemingly requires a conflicting result because of a state rule,

"the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the

Enabling Act nor constitutional restrictions." 380 U.S. at 471.

The case requires that "in the event of such conflict, the Rules shall control." 1A Moore, Federal Practice, para. 0.306 [1], p. 3216 (2nd ed., 1965 Supp.).

Second. It has been held that the very idea for which defendant Lenske contends, that exemplary damages are incompatible with equitable principles, "appears, largely, as an outgrowth of the procedural separation [between law and equity] rather than as an independent substantive rule." I.H.P. Corp. v. 210 Central Park South Corp., 16 App.Div.2d 461, 228 N.Y.S.2d 883, 887 (1st Dept., 1962), affirmed 12 N.Y.2d 329, 239 N.Y.S.2d 547 (1963). In affirming, the Court of Appeals observed that challenge of the award of exemplary damages had come "not as a matter of the law of damages but rather on the procedural ground * * * ." 239 N.Y.S.2d at 548. If the courts were correct that the chancellors' apparent historical reluctance to award exemplary damages essentially grew out of the procedural separation between law and equity, then, even without need of Hanna v. Plumer, it should be clear that decision of the ultimate question must be governed by the Federal Rules. Such reluctance, having a procedural origin, presumably would not be within the ambit of the "substantive distinction between law and equity" referred to in the Straley case, and, accordingly, there would be no need to fear that even the pre-Hanna line of Erie cases would compel consideration of state law.

For these reasons, we commence with consideration of whether the Federal Rules of Civil Procedure permit a federal court to grant equitable relief and exemplary damages.

The Federal Rule

The contention that equity courts cannot award exemplary damages overlooks the nature of these proceedings and the fundamental approach of the Federal Rules.

Under the Rules "(1) there is no longer a law side and an equity side of the court; (2) there are no longer actions at law and suits in equity; (3) there is a 'civil action' in which all relief must be obtained that could formerly be secured at 'law,' in 'equity,' or under the 'hybrid' procedure * * * ." 2 Moore, Federal Practice, para. 2.02 [2], pp. 308-09 (2nd ed., 1965). "The federal decisions are in complete accord that there is no longer a law side nor an equity side to a federal district court * * * ." Id. at para. 2.10, p. 457.

Straley v. Universal Uranium and Milling Corp., 289 F.2d 370, 373 (9th Cir., 1961) flatly recognizes that "legal and equitable remedies may be administered in the same forum and in the same action * * * ." Compare this Court's more recent statement that, under the Federal Rules, "the same court may try both legal and equitable causes in the same action." DePinto v. Provident Security Life Ins. Co., 323 F.2d 826, 835 (9th Cir., 1963), cert. den. 376 U.S. 950 (1964).

These propositions flow directly from the Federal Rules. E.g., Rule 2 provides "there shall be one form of action to be known as 'civil action;'" Rule 8(a) establishes that "relief * * * of several different types may be demanded;" Rule 8(c)(2) authorizes a party to "state as many separate claims * * * as he has * * * whether based on legal [or] equitable grounds * * * ;" and Rule 18(a) makes clear that "a party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join * * * as many claims, legal [or] equitable * * * as he has against an

opposing party."

Because of this authority, defendant Lenske's citation of United States v. Bernard, 202 Fed. 728 (9th Cir., 1913) is inappropriate. That case was decided a quarter of a century before adoption of the Federal Rules and, we respectfully submit, is wholly out of harmony with present concept of the federal courts. See Youngs Drug Products Corp. v. Dean Rubber Mfg. Co., 362 F.2d 129, 134-35 (7th Cir., 1966)(unfair competition action where plaintiff sought and recovered injunctive relief, general damages and \$200,000 punitive damages). The court expressly considered the argument made here by defendant Lenske, rejected it and held the trial court had power to grant all the relief.

The Bernard case explicitly based its decision on the idea that "by applying to a court of equity for relief, the complainant waives all claim to vindictive damages." 202 Fed. at 732. Aside from the fact, to be discussed presently, that the notion of waiver is incompatible with the Federal Rules, it does not form a logical basis for holding that equitable relief necessarily precludes exemplary damages. As succinctly pointed out in I.H.P. Corp. v. 210 Central Park South Corp., 16 App.Div.2d 461, 228 N.Y.S.2d 383, 888 (1962), affirmed 12 N.Y.2d 329, 12 N.Y.S.2d 547 (1963), the waiver theory

"is the least substantial of the attempted justifications. In the absence of words or conduct by a party which manifest an intention to waive any of his remedies, it merely begs the question to hold that a waiver has resulted from a mere

asking for equitable relief. A party cannot reasonably be deemed to have waived a remedy unless he seeks others, knowing they are exclusive. But whether they are exclusive is the very issue here to be resolved. Nor is there any good reason, except that of historical accident, why one should be compelled to elect between two inadequate remedies."

If the waiver theory of the Bernard case still has vitality, then the portions of Federal Rules 8(a), 8(e)(2) and 18(a) quoted at page , supra, are rendered meaningless. We submit that those rules, which plainly permit joinder of claims and demands for both equitable and legal relief, can only be read as putting an end to the thought that a party seeking equitable relief automatically waives his right to a type of legal relief to which he otherwise would be entitled.

We ask this Court to rule that the Bernard case must give way to the purpose and letter of the Federal Rules, "for, as is well understood, the one civil action under the rules is used to vindicate any civil power the district court has * * * ." Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 202 F.2d 731, 734 (2nd Cir., 1953)(per Judge Clark). Compare Rule 54(c), Fed.R.Civ.Proc., requiring that, except in default cases, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled * * * ." This provision "assures a party of all relief, whether it would have been legal or equitable under the prior procedure, of which his

action as litigated shows him deserving." 6 Moore, Federal Practice, para. 54.62, p. 1207 (2d ed., 1965).

The whole question was fully explored in the I.H.P. Corp. case, cited previously. Although it was a state decision, the opinions in both the Appellate Division and the Court of Appeals are highly instructive because they emphasize the very points which are the basis of today's federal procedure. Thus, commenting on the assertion that "a court of equity has no power to award punitive damages," the Appellate Division stated:

"This presupposes that courts still sit exclusively either as equity or law courts and cannot act in both roles at the same time in the same case. By statute, however, legal and equitable causes of action may be joined in the same complaint. * * * * In sum, the plea that an equity court lacks power to award punitive damages does not answer the question whether a modern-day court, empowered and directed to dispense both equitable and legal relief in the same action, may award punitive damages, and also grant a permanent injunction.

* * * *

"It is thus apparent that

the rule which forbids combination of equitable relief with an award of punitive damages is founded upon an obsolete procedural division with no rational basis, apart from history, in modern substantive law or equity. If the facts warrant, it may be entirely appropriate to grant an injunction or another form of equitable relief and also exact punitive damages as a deterrent against flagrantly unlawful conduct, whether embraced within an injunction or not. Such freedom to grant whatever judicial relief the facts call for is entirely consonant with substantive legal and equitable principles and with present-day concepts of procedural efficiency." 228 N.Y.S.2d at 886, 888.

Although it may be that, historically, equity courts, as such, did not award exemplary damages, the Federal Rules and the decisional authorities cited have the necessary consequence that the Knutsens, by stating a claim warranting an equitable remedy, did not irrevocably turn the federal trial judge into a chancellor for all purposes and thereby deprive him of power to award further relief appropriate under the law.

The Oregon Rule

Although the federal rule authorized the award of punitive damages

below, and although defendant Lenske has cited no Oregon authority to the contrary, it is well to note that, as nearly as counsel for the Knutsens can determine, the Oregon Supreme Court has not decided the issue.

Of some assistance is Stott v. J. Al Pattison Lumber Co., 95 Or. 604, 188 Pac. 414 (1920). Although it is true that the precise question was not discussed in the opinion, there can be no doubt that the court affirmed treble damages for willful cutting of trees thereon.

Held v. Kennedy, 77 Or. 526, 151 Pac. 968 (1915) implicitly recognizes the propriety of exemplary damages in equity. That was a suit to rescind a contract. Although the court disapproved the trial court's award of exemplary damages, it did so on the sole ground that "there is nothing in the pleadings or the evidence to justify such judgment." 77 Or. at 528. The case cited by the court for its authority dealt only with the need to plead malice or willfulness. Sullivan v. Oregon Railway and Navigation Co., 12 Or. 392, 406 (1885). Fair implication, therefore, is that had the pleadings alleged and the evidence shown the requisite malice, the court would have upheld the exemplary damage award in the equity suit. Accord: Hodel, The Doctrine of Exemplary Damages in Oregon, 44 Or. L. Rev. 175, 198 (1965).

There is no inherent reason why a so-called equity court could not grant exemplary damages if they otherwise were proper. It is well established under Oregon law that

"a court of equity, having jurisdiction of the subject matter of a suit or having acquired jurisdiction over some portion of the controversy, will proceed to decide the whole issue and award complete relief, although the rights of the parties

are strictly legal and the final remedy
is of a kind that may be granted by a
court of law."

Emrich v. Emery, 216 Or. 88, 95, 332 P.2d 1045 (1959)(emphasis supplied). Thus, "it is always appropriate in a decree in a suit in equity to provide for a money judgment which may be warranted under the issues and the evidence." Esselstyn v. Casteel, 205 Or. 344, 374, 288 P.2d 215 (1955).

In view of these cases, there is no reason to suppose that the Oregon Supreme Court would disapprove the award in an equity suit of exemplary damages which would have been proper in an action at law.

The trial court was correct; it had the power to award exemplary damages.

POINT 4. Defendant Lenske's claim
based on Knutsen's alleged
fraud in an entirely different
transaction was properly
eliminated from the case.

On page 13 of his brief, defendant Lenske refers to a claim he purportedly had by reason of Knutsen's allegedly having defrauded Lenske. (So there can be no mistake, we categorically deny the gratuitous recitations of supposed facts set forth in his brief). He contends that the trial court erred in excluding the claim from the case and cites Rule 13(b), Fed.R.Civ. Proc. which provides that "a pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." (emphasis supplied).

As comparison of Rule 13(b), referring to "counterclaim * * * against an opposing party," with Rule 13(g), referring to "cross-claim * * * against a co-party," makes plain, defendant Lenske could not file a Rule 13(b) permissive counterclaim against his co-party, Knutsen.

"Rule 13 makes a distinction between opposing parties and co-parties.

Claims between co-parties are denominated cross-claims, and are limited to claims arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein, or relating to property that is the subject matter of the original action. Thus, a defendant does not have an unlimited right to plead any and all claims that he may have against a co-defendant; but his right is unlimited as to claims against a plaintiff, the opposing party, since this type of claim is regarded as a counterclaim."

3 Moore, Federal Practice, para. 13.18, p. 48 (2nd ed., 1965).

Nor could his alleged claim satisfy the requirements of Rule 13(g), pertaining to cross-claims. There were no allegations even remotely sufficient to connect his claim either with the transaction, occurrence or property that were the subject matter of the original action. Moreover, the evidence itself showed that he was complaining about a transaction concerning an entirely different piece of property than that involved in the case. (Compare

Tr.-II, p. 140, lines 19-22, with p. 142, lines 18-23; and Ex. 102 with Ex. 110).

Since the claim in question neither qualified as a counterclaim under Rule 13(b) nor as a cross-claim under Rule 13(g), there was no error in refusing to include it in the pretrial order.

POINT 5. There was no error in
excluding from the case
defendant Lenske's con-
tentions that Knutsen came
into equity without clean
hands and that, as a con-
dition of obtaining equitable
relief, Knutsen should have
first offered to pay for Lenske's
alleged legal services.

Clean Hands Doctrine

Defendant Lenske's brief does not say wherein he believes the Knutsen's came into court without clean hands. The only clue in the brief is the reference to the alleged fraud of Knutsen, discussed in Point 4, supra.

Even assuming, solely for purposes of argument, that Knutsen was guilty of fraud as charged, it will be remembered that the transaction allegedly so tainted was different from the one giving rise to the Knutsens' cross-claim against Lenske. See page 42 , supra.

Defendant Lenske's point has no merit because the clean hands doctrine "is confined to misconduct in regard to, or at all events connected

with, the matter in litigation * * * ." Platt v. Jones, 149 Or. 246, 259, 38 P.2d 703 (1934); Wilson v. Parent, 228 Or. 354, 370, 365 P.2d 72 (1961) "in respect to the matter as to which he seeks relief").

Doctrine of Claimant Doing Equity

The doctrine that he who seeks equity must do equity concerns itself with the willingness of a claimant to do those things which the court requires him to do. See Leighton v. Hawkins, 236 Or. 638, 642, 389 P.2d 460 (1964) ("He also has submitted himself to the jurisdiction of a court of equity and therefore must himself be prepared to do equity.") (emphasis supplied); Mumstein v. Stockton, 199 Or. 633, 643, 264 P.2d 455 (1953) ("When a plaintiff brings suit * * * he submits himself to the jurisdiction of equity and must himself do equity as required by the court.") (emphasis supplied). Accordingly, the doctrine may not be understood to punish a claimant for his alleged shortcomings prior to trial, and the suggestion that Knutsen should have offered to pay attorney fees (Lenske Br., 13) is without merit.

In view of defendant Lenske's failure to cite any authorities, we are at a loss to know on what grounds the court should or could have decreed that the Knutsens pay attorney fees to Lenske before they could obtain equitable relief from his fraud upon them. There are compelling reasons why no such order could be entered:

First. As long as we are concerned about the doing of equity, it is pertinent to note that the first time in the entire litigation that defendant Lenske ever disclosed what he wanted by way of attorney fees was on the second and last day of trial. (Tr.-II, p. 248). Neither his answer and cross-claim (R-33), nor any of his contentions (R-45), nor his "additional answer" (R-65) give even a hint either as to the amount he sought or the method by which it could be determined. Efforts to make inquiry of defendant Lenske

prior to trial proved abortive when he declined to testify upon deposition because of fear of self-incrimination. (See Tr.-I, p. 42). He invoked the same constitutional privilege when called as an adverse witness on the first day of trial. (Tr.-I, pp. 39-41). He even refused at trial to answer the question whether he had been Knutsen's attorney. (Tr.-I, p. 39). Since, even under the liberal policies of the Federal Rules, a plaintiff is required to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," Conley v. Gibson, 355 U.S. 41, 47 (1957), it just does not make sense for a person found to have committed fraud to be able to insist upon his victim's paying him when the wrongdoer frustrates every attempt of the victim to secure notice of what is demanded of him.

Second. Compelling Knutsen to pay attorney fees under the guise of requiring him "to do equity," as a practical matter, would be the same thing as permitting defendant Lenske to obtain a cross-claim for those fees. At least with respect to such portion of the fees as were not attributable to services "relating to" the property sought to be foreclosed, any such relief rather clearly would be beyond the scope of Rule 13(g), discussed earlier.

Third. Insofar as defendant Lenske would have had Knutsen pay fees for services in connection with the subject property, Findings of Fact Nos. 4-8, and especially Finding No. 9 (that Lenske defrauded Knutsen), dispose of his claim. "'Fraud or unfairness on the part of the attorney will prevent him from recovering for services rendered; * * *.'" Terry v. Bender, 143 Cal.App.2d 198, 300 P.2d 119, 129-30 (1956); In re Conrad, 340 Mo. 582, 105 S.W.2d 1, 10 (1937)("if an attorney seeks to secure personal advantage of his client, he is not entitled to any pay for his services"); Duffy v. Colonial Trust Co., 287 Pa. 348, 135 Atl. 204, 205 (1926)(entire fee disallowed where portion of services connected with fraud).

It would not have been requiring Knutsen "to do equity" to compel him to pay attorney fees to defendant Lenske; therefore, there was no error in excluding the issue from the case.

POINT 6. There was no error in the trial
court's treatment of the issue whether
Knutsen owed defendant Lenske for
advances or services.

The last relatively specific point defendant Lenske urges under Assignment of Error No. 5 is that it was error for the trial court allegedly to have eliminated from the pretrial order the issue "Does Magner Knutsen owe money to Reuben Lenske for advances and/or services and if so what amounts?" (Lenske Br., 13).

As defendant Lenske admits (Lenske Br., 12), the final pretrial order included his contention that the subject property "was knowingly and advisedly conveyed by Magner Knutsen to the Heddons * * * as security to the Heddons and Reuben Lenske for any advancements in money or services as might be rendered or were rendered for the benefit of Magner Knutsen and that are unrecompensated advancements in services which were made and rendered pursuant to said agreement." (R-67, at 70). Issues of Fact were framed to cover the contention. Issue of Fact No. 2 inquired whether there was consideration for the deed (ibid.); Issue of Fact No. 3 asked whether Knutsen executed the deed "as security for advancement of money and/or services" (ibid.); and Issues of Fact Nos. 5 and 6 inquired whether there had been agreement between Knutsen and Lenske or Knutsen and Heddons that delivery of the deed was for advances and/or services (ibid.).

Although the foregoing contention and issues of fact, as set forth in the final pretrial order, do not follow the precise language suggested by defendant Lenske in his proffered issue, a reasonable reading of the material

can only yield the conclusion that it fairly covered the issue.

There was no reason for the court to have framed the issues more broadly than it did, because to do so would have opened the case to litigation over questions of alleged fees and advances having nothing to do either with the transaction or the occurrence or the property which was the subject of the original action. Such areas of inquiry, as previously observed, would extend defendant Lenske's cross-claim beyond the limits permitted by Rule 13(g), Fed.R.Civ.Proc. Moreover, in view of his having failed at any time in the case to give notice either of the amounts which he claimed or of the manner in which they could be ascertained, see pages 44 - 45, supra, it is difficult to understand by what manner of reasoning the court could be deemed to have erred in refusing to accept the open-ended contention.

In all events, regardless of the precise words used by the pretrial order to describe the issues, there can be no doubt that:

1. Defendant Lenske's extensive cross-examination of Knutsen was a clear effort to show that some of Lenske's money was used in behalf of Knutsen. The court and counsel specifically made reference to this attempt. (Tr.-I, pp. 141-43).

2. The essential thrust of defendant Lenske's long, narrative testimony (which never once was interrupted by objection) was the many supposed benefits as lawyer and benefactor he bestowed upon Knutsen. (Tr.-II, pp. 234-58).

That the court understood these matters of supposed fees for services and loans to be an issue certainly is clear from the fact that Finding of Fact No. 6 stated in relevant part: "There was no convincing proof of the amount or

value, if any, of legal services rendered or loans or advances made by defendant Lenske to defendants Knutson * * * ." (R-at 79).

In short, the pretrial order adequately covered the issues raised by the Lenske contention; to have broadened the litigation would have been improper under Rule 13(g); and Lenske's own conduct at the trial and the resultant finding of fact show that both parties and the court understood the issues were before them. There was no error.

POINT 7. Defendant Lenske waived
his right to have included
in the pretrial order the
matters which he claims
were excluded.

In the first six points set forth above, we have attempted to show why, under applicable law, the trial court's exclusion of certain issues from the case was proper. In addition to these substantive reasons why there should be refusal of this Court to find error, we mention again the proposition that not including those issues in the pretrial order also was warranted by reason of defendant Lenske's voluntary refusal to attend pretrial conference. See Answer to Assignment of Error No. 2, supra.

ANSWER TO ASSIGNMENT OF ERROR No. 6

THE TRIAL COURT'S AWARD OF GENERAL AND EXEMPLARY DAMAGES WAS WARRANTED BOTH IN FACT AND LAW.



POINT 1. The award of general
damages was proper.

In Oregon "the party guilty of fraud is liable for such damages as naturally and proximately resulted from the fraud. This is the universal rule." Selman v. Shirley, 161 Or. 582, 609, 85 P.2d 384 (1939). Typically, the real question in any case comes down to which damages were the "proximate result" of the fraud and which were not. Fortunately, the Oregon Supreme Court went further:

"To facilitate its application
the proximate result rule is often subdivided
into four auxiliary rules: (1) A defrauded party
is entitled to all out-of-pocket losses; * * *
and (4) he is entitled to all consequential
damages." 161 Or. at 615, 91 P.2d 312.

There should be no doubt that, under the evidence, the foreclosure of the government's mortgage was the direct and proximate result of defendant Lenske's fraud:

First. It bears worth repeating that Knutsen ceased making payments on the mortgage when he discovered, in January, 1965, that defendant Lenske would not reconvey the property. (Tr.-I, 58; Ex. 104). His stated reason for the cessation was that since Lenske would not reconvey, he did not want to "be just buying property for them," Lenske and record-owner Heddon. (Tr.-I, p. 59). Any doubt that, in truth, this was the reason for the default under the mortgage could arise only from a determination that Knutsen testified dishonestly. But that is not for this Court to do.

"[T]he trial court's appraisal of

the credibility of the witnesses is to be accepted, no challenge to such appraisal being permissible in the appellate court. Appellants' attack upon the credibility of witnesses whose testimony was apparently accepted by the court will therefore be disregarded."

Nuelson v. Sorenson, 293 F.2d 454,
460 (9th Cir., 1961).

Second. Defendant Lenske acknowledged that he had been informed by Knutsen that F.H.A. and the United States Attorney's office were concerned about title being in the Heddens' name and that they were pushing Knutsen in that regard. (Tr.-II, pp. 264, 266).

Third. The government certainly viewed cessation of mortgage payments as the reason for its foreclosure. (See complaint R-1, at 2, para. 6).

Taken together, this evidence shows rather clearly that the mortgage foreclosure was the direct result of the facts that (a) the government was unsuccessful in pushing Knutsen to recover title and (b) cessation of payments. The fraudulent deprivation of title is the only possible cause.

The damage suffered by the Knutsens because of foreclosure was two-fold:

(1) The foreclosure decree awarded the government judgment against Knutsen for \$182.88 by way of costs. (R - 42, at 43).

(2) After the foreclosure decree, the Knutsens continued to occupy the subject property,

but as tenants³ obliged to pay \$220 for use of the land and \$50 per month for occupancy of the house thereon. (Tr.-I, 60-61). Under the terms of his 10-month lease from the government, he therefore would have to pay \$720 rent, none of which could apply against the principal of the government's judgment against him. (Ibid).

Whether viewed as out-of-pocket expenses or consequential damages, the total of court costs and rent certainly would not have had to be paid if the mortgage foreclosure, caused directly by defendant Lenske's fraud, had not occurred. Although Lenske claims there was no evidence of damages (Lenske Br., 14), we submit that when, by reason of another's fraud, the owner of land has to pay court costs resulting from foreclosure of his rights to the land, and when that owner's monthly payments, instead of going to reduction of the purchase price of the land are treated merely as rent, the owner necessarily has been damaged. Simply as a matter of logic, these damages, totalling \$902.88, were proximately caused by and the natural consequence of fraudulent deprivation of the Knutsens' title. Compare Selman v. Shirley, supra, 161 Or. at 627:

"But the wrongdoer is not the favorite of the law. The primary concern of the law of fraud is not to make the wrongdoer's position safe, and it has not formulated

³ The Knutsens could not continue to occupy their home in any status other than as tenants because they could not refinance and thereby redeem the property from the government. They attempted to refinance, but "couldn't get a loan anyplace, because the title wasn't in my name." (Tr.-I, p. 60).

its rule of damages in such a manner that as he plans his course of action he may know beforehand the amount of damages which he will be compelled to pay in the event his deceit is discovered. In fact, the great majority of the cases hold that the law of fraud is not concerned with his contemplations but with those of his victim. The proximate result and the natural consequences of the fraud are determined from the point of view of the victim as he contemplated his purchase." (emphasis supplied).

See also Chesapeake & Ohio Ry. Co. v. Elk Refining Co., 186 F.2d 30, 32-33 (4th Cir., 1950) (allowing injured party to recover rent paid for use of other property when he was deprived of use of his property which had been damaged).

The finding of the trial court manifestly was supported by the evidence and, in all events, "shall not be set aside unless clearly erroneous * * * ." Rule 52(a), Fed.R.Civ.Proc. As this Court has noted, "every intendment must be given the district court's findings, and especially so with respect to damages * * * ." United States National Bank v. Fabri-Valve Co., 235 F.2d 565, 568 (9th Cir., 1956).

POINT 2. The award of exemplary damages was proper.

Previously we answered the contention (Lenske Br., 14) that a so-called "equity court" could not award exemplary damages. (See pages 32-41, supra). But even though the trial court had power to award such damages, the question remains whether it was proper in this case. There were two bases for the award:

Fraud

Fraud, of course, may give rise to imposition of exemplary damages. See, e.g., Lewis v. Worldwide Imports, Inc., 238 Or. 580, 582, 395 P.2d 922 (1964)(seller represented automobile to be a demonstrator in new condition when, in fact, it had been seriously damaged in an accident).

There should be no doubt that defendant Lenske defrauded the Knutsens, and the trial court's specific finding that he did (Finding No. 9) should not be set aside:

First. Lenske expressly admitted that deeding the property to the Heddens was his suggestion. (Tr.-II, p. 242).

Second. Lenske did not deny that, when he explained that the purported purpose of the conveyance was to put it beyond the reach of Knutsen's former wife, Knutsen told Lenske that he did not believe she would go after it, but Lenske thereupon insisted, "Well, we will just do it to be on the safe side." (Tr.-I, p. 49)(emphasis supplied).

Third. If, as defendant Lenske contended, the deed was to secure advances and/or legal fees, one would assume that he would have used a mortgage, the conventional method by which real property is given as security for a debt. There certainly was no reason to employ a warranty deed unless defendant Lenske wanted something more than security -- like to deprive his client of title. Any suggestion that a mortgage would not adequately protect his rights as a purported creditor because of fear Knutsen's former wife



would levy on the property are absurd, and, as an attorney, Lenske can be presumed to have known better.⁴

Fourth. There was no agreement that the property was to be conveyed as security either for loans or legal fees. The trial court so found. (Finding No. 6). Knutsen expressly denied existence even of any conversations with defendant Lenske about use of the property as security (Tr.-I, p. 52); he never was billed for services (ibid; II, p. 247); he neither requested, nor did Lenske offer to make any loans (Tr.-II, p. 139); and defendant Lenske, the man so cautious that he claims to have taken a warranty deed as security, never bothered with a promissory note or any other document to evidence the existence or amount of the purported indebtedness (ibid). These facts are more than adequate support for the finding.

Fifth. In determining whether defendant Lenske committed fraud upon the Knutsens, it must be remembered that an attorney-client relationship existed. In those circumstances, the burden of proof was on Lenske to establish that he had not abused the relationship and that the transaction was not tainted by fraud. Phipps v. Willis, 53 Or. 190, 194-95, 96 Pac. 866 (1909).

Not only was this fraud, but the trial court properly found that it was willful and malicious. (Finding No. 9). We referred earlier to the fact that, in 1963, defendant Lenske deliberately gave lulling reassurances to

⁴ Under Oregon law, required monthly installments for child support do not become judgments until the installment accrues. Stephens v. Stephens, 170 Or. 363, 367-68, 132 P.2d 992 (1943). Therefore, had a mortgage been given and recorded in April 1962, subsequently maturing child support installments would be inferior to the mortgage lien. See Clarke - Woodward Drug Co. v. Hot Lake Sanatorium Co., 88 Or. 284, 292, 169 Pac. 796 (1918) (holding that even a mortgage on after-acquired property has priority over a judgment subsequent to mortgage recordation).

Knutsen that he would "look into" the matter of a reconveyance. (Tr.-I, p. 64). By his own testimony, he was still at it in 1965, when he claims to have told Knutsen that he, Knutsen, should tell the government that "there would be no problem involved so far as the property being reconveyed from the Heddons to him at the appropriate time * * * ." (Tr.-II, p. 251). He even had the fortitude to suggest to Knutsen's counsel, after this litigation commenced, "Use your efforts to get the Government to accept installment payments. * * * * Let him [i.e., Knutsen] pay that hundred dollars a month. He's not losing anything, and it's applying upon the balance owing." (Tr.-II, p. 254). Defendant Lenske was not content to deprive Knutsen of the title to the land; he obviously wanted him to pay off the mortgage as well.

Malfeasance of an Attorney

In deciding whether award of exemplary damages was proper, it must be remembered that this was more than a case of conventional fraud; it was fraud by an attorney upon his client.

Harper v. Interstate Brewery Co., 168 Or. 26, 120 P.2d 757 (1942)

is a perfect example of the Oregon Supreme Court's affirmance of an award of exemplary damages by reason of malicious breach of duty. Defendants sold property pursuant to a power of sale contained in a deed given as security. Plaintiff sought compensatory and exemplary damages for defendants' breach for the "duty recognized both at law and in equity to act in good faith using all reasonable efforts to make the sale beneficial to the mortgagor by obtaining for the property the best price reasonably obtainable." 168 Or. at 40. The Court held:

"The jury having found that defendant Gage acted maliciously and in disregard of the rights of the plaintiff, were also authorized under the evidence to impose

punitive damages against both the principal and the agent." 168 Or. at 51.

This case has prompted the observation that:

"Once the court determined that the defendants owed the plaintiffs a duty to act in good faith, the court treated them in much the same way that it does a physician who is grossly negligent with a patient. That is, a failure to act in accordance with the higher duty cast upon a physician or a trustee is sufficient to subject him to exemplary damages even though the normally required malice or intent to injure may not be present." Hodel, "The Doctrine of Exemplary Damages in Oregon," 44 Or. L. Rev. 175, 217-18 (1965). (emphasis supplied).

Olson v. McAtee, 181 Or. 503, 182 P.2d 979 (1947) is one of the cases involving a physician which comes within the "higher duty" thesis of the commentator. There the Court observed:

"Considering the character of the defendant's profession and the obligations it imposes, we think it needs no argument to support the conclusion that on this evidence, unexplained as it is by the defendant, the jury was warranted in finding him guilty of gross negligence and including in the verdict an award of punitive damages." 181 Or. at 520 (emphasis supplied).

The Oregon Supreme Court has not had occasion, to counsel's knowledge, to comment upon the propriety of awarding exemplary damages in a case, involving an attorney, such as is before this Court. However, in view

of its decision upholding such an award for a physician's grossly negligent breach of his duties, it is most reasonable to assume it would sanction the award in the case of an attorney's willful disregard of his duties as a member of the bar. Compare this Court's holding that Oregon law allows exemplary damages when it is determined that defendants "acted with wanton disregard of the property rights of [plaintiffs] or other aggravating circumstances, or recklessly so as to imply a disregard of social obligations or other improper motive." Reynolds Metals Co. v. Lampert, 324 F.2d 465, 466 (9th Cir., 1963), cert. den. 376 U.S. 910 (1964).

From these authorities it is fair to conclude that, both because of the fraud and the special relationship of the parties, it was proper for the court to award exemplary damages.

ANSWER TO ASSIGNMENT OF ERROR No. 7

THERE WERE NO ERRORS EITHER IN FINDINGS OF FACT OR CONCLUSIONS OF LAW

POINT 1. Finding of Fact No. 4 was
supported by the evidence.

Defendant Lenske challenges Finding of Fact No. 4, that "in 1962, defendant Lenske, acting in his capacity as attorney for defendants Knutsen, induced defendants Knutsen to execute a warranty deed to the real property in question, which deed was recorded April 18, 1962 in the names of Harold E. Heddon and Hellen B. Heddon as grantees."

Exhibit 102, the deed, shows it to be in the names of the Heddens

as grantees and that it was recorded on April 18, 1962. Knutsen testified (Tr.-I, p. 49) and Lenske admitted (Tr.-II, p. 241) that the conveyance was suggested by Lenske. Lenske admitted that he was acting as Knutsen's attorney at the time of the conveyance. (Tr.-II, p. 264).

There was no error in making Finding of Fact No. 4.

POINT 2. Findings of Fact Nos. 5 through
9 were supported by the evidence.

Defendant Lenske also challenges Findings of Fact Nos. 5 through 9, inclusive.

We previously have set forth in considerable detail the facts concerning the conveyance at the suggestion of defendant Lenske and his and Heddons' refusal to reconvey. (Pages 2-5, 53-55, supra). Those facts more than adequately justify:

Finding No. 5, that "there was no agreement between defendants Knutsen and defendant Lenske or between defendants Knutsen and defendants Heddon that the conveyance was to secure fees for legal services, loans or advances, either past or future;"

Finding No. 7, that "neither defendant Lenske nor defendants Heddon have any valid claim either to the real property in question or to the right of redemption with respect thereto;"

Finding No. 8, that "defendants Lenske and Heddon have failed and refused, after demand, to convey to defendants Knutsen whatever interest or

right they may have claimed with respect to said real property;" and

Finding No. 9, that "the acts and refusal to act of defendant Lenske, while he was attorney for defendants Knutsen, were a breach of fiduciary duties owed to defendants Knutsen and were willfully and maliciously committed for the purpose of fraudulently depriving defendants Knutsen of said real property and their right therein."

The same facts support also:

Finding No. 6, that "there was no convincing proof of the amount or value, if any, of legal services rendered or loans or advances made by defendant Lenske to defendants Knutsen, or of any consideration passing from defendant Lenske or any others to defendants Knutsen."

In addition to those facts, we also call to the Court's attention the following matters with respect to Finding No. 6:

First. Insofar as legal fees are concerned, defendant Lenske had no right to claim any because he defrauded his client. (See discussion at page 45, supra).

Second. Insofar as loans are concerned, Knutsen testified that he neither requested, nor did defendant Lenske ever offer to make any (Tr.-II, p. 139). Moreover, even Heddon admitted that he never loaned any money to Knutsen. (Tr.-II, p. 174). It may be that Heddon gave money to Lenske, but there is no evidence it was used for the benefit of Knutsen, much less at his request. True, Lenske disbursed funds for the account of Knutsen, but

they undoubtedly were the monies which Lenske, himself, owed on the Willark property he had purchased under contract from Knutsen. (See Tr.-II, p. 243, where Lenske admits he was the purchaser; II, p. 240, where Lenske claims the unpaid balance on the Willark property contract was \$3,881). Knutsen testified he told Lenske that, out of the sums due on that contract, he wanted back child support payments satisfied and some money sent to Mrs. Cook, and that Lenske also said he would forward some payments to F.H.A. (Tr.-II, p. 153). In those circumstances, it is incredible that defendant Lenske would maintain the disbursements were from monies he borrowed from Heddon.

The questions of whether Knutsen owed money either for services or loans were part of defendant Lenske's case, and he had the burden of proof. ORS 41.210 (providing in relevant part that "the party having the affirmative of the issue shall produce the evidence to prove it."); ORS 41.240 (providing in relevant part that "each party shall prove his own affirmative allegations."). The issues were factual, and their resolution depended to considerable extent upon the credibility of the witnesses. That being true, the trial court's finding should not be set aside. Rule 52(a), Fed.R.Civ.Proc.; Nuelson v. Sorenson, 293 F.2d 454, 460 (9th Cir., 1961)(opinion quoted at pages 49-50, supra).

POINT 3. Findings of Fact Nos. 10,
11 and 12 were supported
by the evidence.

Defendant Lenske challenges Findings of Fact Nos. 10 through 12. We previously have shown why, under the facts, the trial court

properly entered its Finding of Fact No. 10, that "defendants Knutsen did not discover or have reason to discover the fraud practiced upon them until 1965. (See pages 20-23, supra).

Similarly, we have set forth the facts which warranted Finding of Fact No. 11, that "as a direct and proximate result of the acts of defendant Lenske, defendants Knutsen have suffered general damages in the amount of \$250.00" (see pages 49-52, supra), and Finding of Fact No. 12, that "defendants Knutsen are entitled to an award of exemplary damages against defendant Lenske in the amount of \$5,000.00." (See pages 53-57, supra).

POINT 4. Conclusions of Law Nos.
2 through 6 were proper.

In view of the extensive discussion of both facts and law heretofore set forth, we submit that each and every of the trial courts Conclusions of Law were warranted by the facts and in accordance with governing rules of law.

ANSWER TO ASSIGNMENT OF ERROR No. 8

THERE WAS NO ERROR IN DENYING DEFENDANT LENSKE'S MOTION FOR NEW TRIAL.

POINT 1. There was no error in
denying defendant Lenske
leave to amend his motion
for new trial.



72

The decree was entered on May 23, 1967. (TDE - 5/23/67). On June 1, 1967, defendant Lenske filed a motion for new trial (TDE - 6/1/67) which requested an additional thirty days from the date thereof within which to amend the motion for new trial. (R - 83).

Rule 59(b), Fed.R.Civ.Proc. provides that "a motion for new trial shall be served not later than 10 days after the entry of the judgment." By the terms of that rule, the time for filing a motion for new trial in this case would expires on June 2, yet the request for additional time, if allowed, would have permitted amendment at any time through June 30.

We submit that it would have been improper for the trial court to have permitted amendment after June 2. Rule 6(a), Fed.R.Civ.Proc. expressly provides that the trial court "may not extend the time for taking any action under Rules * * * 59(b) * * * except to the extent and under the conditions stated in them." Rule 59(b) makes no provision for extension of time or amendment. The rule is that a trial court may not grant a new trial for reasons not assigned in a motion made prior to expiration of the 10-day period. Russell v. Monongahela Ry. Co., 262 F.2d 349, 354 (3rd Cir., 1958)(original motion timely, but court refused to consider amendments). This Court's decision in Yanow v. Weyerhaeuser Steamship Co., 274 F.2d 274, 284 (9th Cir., 1959)("It may be considered an attempted amendment or enlargement of the earlier motion. Of course, the addition then of new grounds for the motion would be ineffective * * * .") appears to accord.

Even if, however, there was power to permit the amendment, it was a discretionary matter with the trial court. McCloskey v. Kane, 285 F.2d 297, 298 (D.C. Cir., 1960). There was no abuse of the discretion since the trial judge and the parties had just sat through the trial, which lasted only two days, and therefore can be assumed to have had matters reasonably

fresh in their minds so as not to need a transcript; the transcript was not finished until August 28, 1967 (Tr.-11, p. 286), so defendant Lenske would not have had it available to him within the additional time he requested; and the motion as it was, was lengthy and went into considerable detail without benefit of a transcript. In this regard, even the matters raised in defendant Lenske's brief on appeal add nothing of substance to the motion for new trial he filed.

POINT 2. There was no error in
denying the motion for
new trial.

The action of the trial court in denying a motion for new trial "will not be disturbed on appeal except in case of plain abuse of discretion." Francis v. Southern Pacific Co., 162 F.2d 813, 818 (10th Cir., 1947), affirmed 333 U.S. 445 (1948). Bearing in mind the facts and law discussed heretofore, and in view of the harmless error rule of Rule 61, Fed.R.Civ.Proc., there was no abuse of discretion in denying defendant Lenske's motion for new trial.

ANSWER TO ASSIGNMENT OF ERROR NO. 9

The ninth assignment of error is nothing of the sort. Rather, it is a collection of attacks upon the credibility of Knutsen, the sincerity of his counsel and the government and the fairness of the trial court.

We already have noted that the trial court resolved the credibility issue in favor of Knutsen and that, under Rule 52(a), Fed.R.Civ.Proc., and

72
this Court's holding in Nuclson v. Sorenson, 293 F.2d 454, 460 (9th Cir., 1961), such is not a permissible issue on appeal. Moreover, review of the facts in this case, especially insofar as they relate to defendant Lenske's fraud, suggest, we submit, that it ill becomes him to say very much about the subject of credibility.

The charge (Lenske Br., 23) that Knutsen and his counsel collaborated with the government in some sort of vendetta against defendant Lenske is wholly unsubstantiated. Whatever may be his grievances against the United States Attorney's office or any other branch of government, the suggestion that Knutsen's counsel joined in a "probing of how to get at" him is emphatically denied. The government, after all, was the party who sought and secured foreclosure of the Knutsons' interest in their property. It was not a party to the cross-claim, which was prosecuted by Knutsen and his counsel for reasons which, in view of the findings below, are self-evident.

Finally, we respectfully suggest that the accusation that the trial judge was unfair is totally baseless. Review of the transcript shows that, to the contrary, he demonstrated extreme patience and leniency with defendant Lenske.⁵ Unhappiness with a judge's decisions is no excuse for making unfair attacks upon him.

⁵ E.g. : Allowance of Lenske's motion to add new defense raised for the first time on the day before trial (Tr.-I, p. 17); ordering Knutsen's counsel to surrender and permit Lenske to use documents Knutsen's counsel had sealed and reserved for impeachment (Tr.-I, pp. 82-83); allowing Lenske relief from Local Rule 36, requiring all exhibits to be marked for identification prior to trial (Tr.-I, pp. 117-121); allowing Lenske to introduce testimony of expert witness, notwithstanding the fact that, contrary to the trial court's prior order, Lenske had failed to disclose his identity to Knutsen's counsel. (Tr.-II, pp. 275-76).

CONCLUSION

There were no errors below. The decree and judgment should be affirmed.

Respectfully submitted,

KEANE, HAESSLER, BAUMAN and HARPER

By

Donald H. Pearlman

Attorneys for Appellees

CERTIFICATE UNDER RULE 18(2)

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD H. PEARLMAN

Of Attorneys for Appellees

PROOF OF SERVICE

I hereby certify that I served Reuben G. Lenske, appellant herein appearing pro se, with three true and correct copies of the within Appellees' Brief, by mailing such copies to said Reuben G. Lenske at 1014 S. W. Second Avenue, Portland, Oregon 97204, his last address shown on any document served by him upon appellees' counsel in this appeal; that said copies were certified by me to be true and correct copies of the original; that said copies were placed in a sealed envelope addressed to Reuben G. Lenske, with the postage thereupon prepaid; and that said envelope was deposited in the United States Post Office, Portland, Oregon on March 18, 1968.

Donald H. Pearlman
Of Attorneys for Appellees

APPENDIX "A"

RULE 36 - CIVIL RULES
RULES OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

"(a) When a pretrial conference is held:

"(1) Each party shall disclose to all others and permit examination of all exhibits which he expects to offer in evidence at the trial, except those which are to be used solely for impeachment or in rebuttal or to refresh recollection and they may be sealed.

"(2) Unless so disclosed, no exhibits shall be received in evidence at the trial unless the adverse party consents or the Court finds that substantial prejudice might result from the exclusion of such exhibits and that there was reasonable ground for failing to disclose such exhibits prior to trial.

"(3) All exhibits shall be marked for identification at least one day prior to the trial and shall be listed in the pretrial order.

"(b) When no pretrial conference is held, exhibits shall be disclosed to all other parties not later than two days prior to trial."

APPENDIX "B"

EXCERPTS FROM STATUTES OF OREGON

ORS 12.040(1)

"A suit shall only be commenced within the time limited to commence an action as provided in this chapter; and a suit for the determination of any right or claim to or interest in real property shall be deemed within the limitations provided for actions for the recovery of the possession of real property."

ORS 12.040(4)

"In a suit upon a new promise, fraud or mistake, the limitation shall only be deemed to commence from the making of the new promise or the discovery of the fraud or mistake."

ORS 12.050

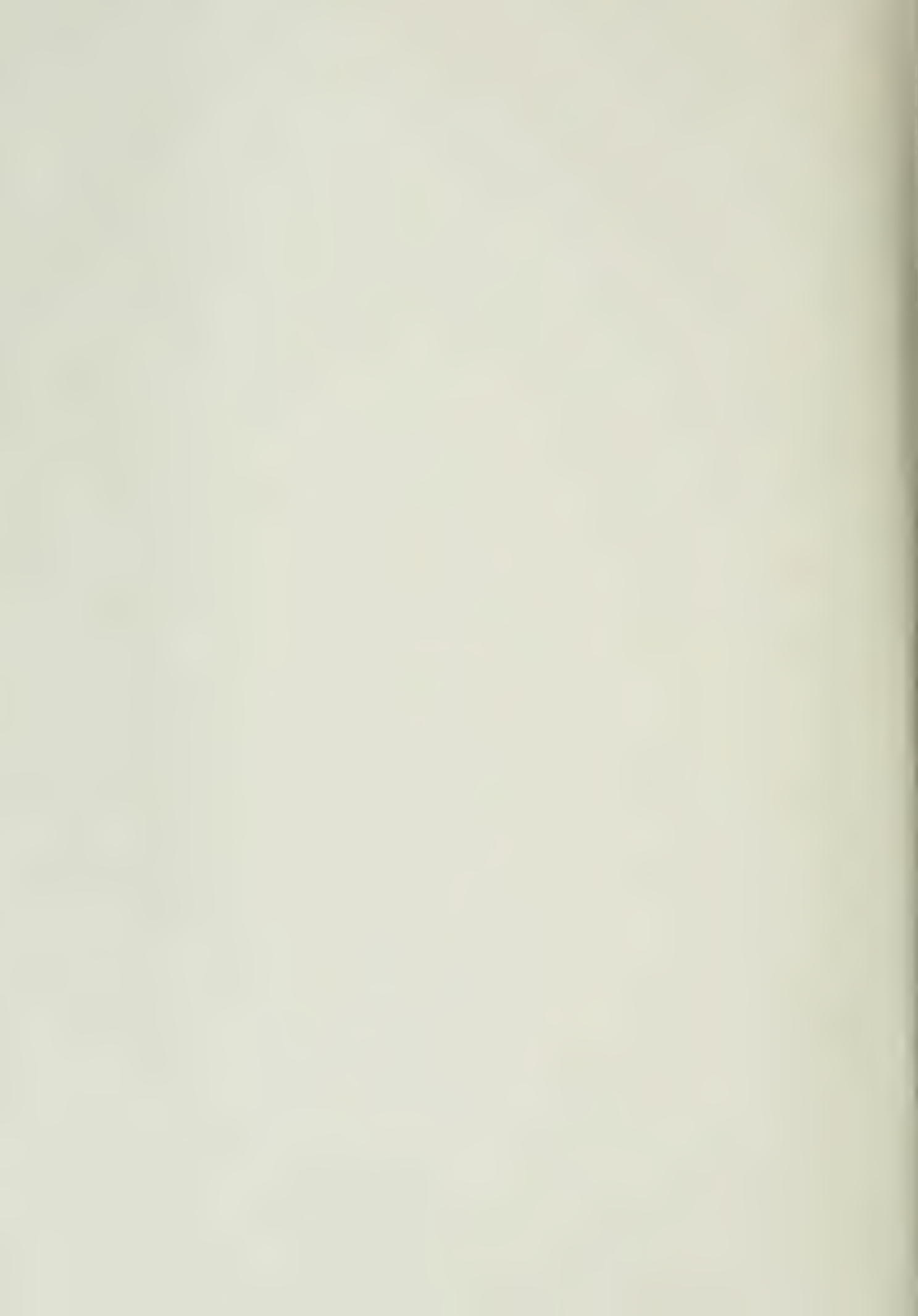
"An action for the recovery of real property, or for the recovery of the possession thereof, shall be commenced within 10 years. No action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seised or possessed of the premises in question within 10 years before the commencement of the action."

ORS 12.110(1)

"An action for * * * any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, that in an action at law based

upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit."





No. 22207

JUL 1969

UNITED STATES COURT OF APPEALS
for the NINTH CIRCUIT

- - - - -

Reuben G. Lenske,

Appellant

v.

Magner Dale Knutsen and Judith
Knutsen,

Appellees

- - - - -

APPELLANT ' S

REPLY BRIEF

- - - - -

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

- - - - -

Reuben G. Lenske
1014 SW 2nd Avenue
Portland, Oregon 97204
Attorney pro se

FILED

JUN 19 1969

WMM B LUCK

SUBJECT INDEX

Page

He lost his top hat	- - - - -	1
Assignment of Error 1	- Prejudice - - - - -	2
"	2 - Bilateral pre trial conference	4
"	2 1/2 Exhibit 120 - - - - -	5
"	3 - Right to jury trial - - - - -	6
"	4 - Statute of Limitations	9
"	5 - Right to state my contentions	11
"	6 - My claims against Knutsen	17
	He who seeks equity must do equity	17
	Clean hands doctrine	17
	No punitive, no compensatory dam.	20
"	7 - Wrong Findings of Fact - - - - -	25
"	8 - My motion for a new trial - - - - -	26
"	9 - Knutsen's credibility gap - - - - -	26

Authorities

Federal Rules of Civil Procedure	- 13(g) - - - - -	12, 13
"	38 - - - - -	6, 7, 8
"	39 - - - - -	6, 7, 8
OREGON REVISED STATUTES	12.040(4) 12.110(1) - -	9
	14.260	3

28 USC 144, Prejudice		2, 3
83 CJS Subrogation, 575, 579, 624		28

Cases

Becker v. Pearson, 241 Or 215, 220(1965) 405 P2d 534	15
Bingham v. Salene, 15 Or 208, 217, 218 (1887) 14 Pac 521 - - -	19
De Yulia et ux v Brownell, 107 Or 651, 657(1923) 215 Pac 576	27
Dietzman v. Ralston Purina Co. 84 Adv Sh 497 425 P2d 163	16
Hamilton v Holmes, 48 Or 453, 461(1906, 87 Pac 154 - - -	18
Hay v Erwin, 244 Or 488(1966), 419 P2d 32 - - - - -	18
Jackson v. Stearns 48 Or 25, 29, (1906) 84 Pac 798 - - - - -	18
O'Harra v Pundt, 210 Or 533, 550(1957, 310 Pac 1110	15
Perry v Thomas et al, 197 Or 374, 391(1953, 253 P2d 290	15
Smith v Abel, 211 Or 571, 595, 316 P2d 793	15
State v Weiss, 84 Adv Sh 1057, Aug 2, 1967	3

APPELLANT'S REPLY BRIEF

He lost his top hat

When Franklin Roosevelt was inaugurated in March, 1934, banks were closing left and right all over the United States. Roosevelt found it necessary to declare an extended bank holiday to prevent wholesale bank liquidations. Roosevelt then called for remedial legislation to protect the banks and secure the de po sitors. Fortified with such legislation and wise federal administrative steps, the banks reopened and have prospered ever since. But what was the banks' reaction ^{to} Roosevelt's saving them? Appreciation? Never. They villified Franklin Roosevelt for not having given them an extra bonanza of billions of dollars profit when the gold content of the dollar was reduced. In response, Roosevelt likened the banks to a man wearing a tophat. As he strolled along the river bank he fell into the river and was about to drown when an interested passerby jumped into the river and brought the drowning man safely to shore. Upon gaining his composure, the rescued man, glancing at the river, observed his tophat floating down the river beyond reach and he turned critically toward his rescuer with the severe admonition that he should have saved his tophat.

No unbiased person can read the record in this case and examine the exhibits without coming to one uncontradictable conclusion, that I saved the farm, home and timber property for Knutsen with the sole limitation that I expected to be paid fair compensation for my services and advances. No one can fairly read into the record anything else. But Knutsen was not content with my having saved his farm for him, he wanted the tophat also; he wanted it free of the burden of paying for the rescue. Stripped of the legal folderoll that is all this case is about. Had I the courage and had I not had two disheartening experiences with judges (this case is one and my tax case,

19539, CCA 9, is the other) I would rest my reply without further ado. But I shall answer to a modest extent the legal folderoll with my own. I shall cover later the statements in pages 1 to 5 of appellees' answering brief that need correction and shall commence with their arguments.

Prejudice

My Assignment of Error I, page 6; Appellees' brief pages 6-10.

Appellees make three points. The first is that I had secured the disqualification of Judge Kilkenny and therefore used up the limit of one. 20144 appears on page 6 of my opening brief. It says in part,

"A party may file only one such affidavit in any case."

The intention to file an affidavit is not the equivalent of filing one.

Who would want to be penalized for each intent that is not carried out or deserve to be rewarded for each good intent not carried out? One must indeed grab for straws to extend the plain wording of the law as sought by counsel for appellees.

Appellees' point 2 is that the affidavit wasn't filed timely. Judge Kilkenny after disqualifying himself, on April 21, 1967 set the matter for pretrial with Judge Belloni for April 24, 1967. Immediately after that, on April 21, 1967 I left for California and did not return till April 28, 1967 and did not come to my office till that afternoon, which was Friday. I had a case pending in the Supreme Court of Oregon which was to be argued on May 5, 1967. In the meantime I had to appear before the trial court on May 2, 1967. I had to come to court with a brief for the Circuit Court of Appeals and did on May 12, 1967. That was also on a Friday. May 15, 1967, Monday, was the first opportunity available for me to file the affidavit of prejudice and then I did. I had not previously appeared before Judge Belloni in this case and when I did appear before him on May 16, 1967 I argued my motion. See OR 63, Tr Vol. I, page 30. I proceeded with the affidavit as soon as I physically could under my circumstances.

Finally, as their point 3, appellees attack the sufficiency of my affidavit. I set forth, R 64, the series of unjust influencing forces that pervaded the judges of my State over a period of almost five years leading directly to the fact "that I believe that the Hon. Robert C. Belloni...is prejudiced against me and that I cannot have a fair and impartial trial before him."

Judge Belloni denied me the opportunity to adduce evidence in support of my motion to disqualify him, Tr Vol I, 3. Appellees do not deny in their brief the facts I set forth in the last paragraph of page 6 of my opening brief which demonstrated more than an affidavit could that Judge Belloni's consideration for the physical well being of Knutsen and his attorney were not present when I needed human consideration. Judge Belloni criticized me for my slowness at the end of a full day's trial, or what should have been the end of the day at 5 o'clock, when I had not during the entire day had anything to eat; yet he required me to proceed with the trial after 5 o'clock despite my request for adjournment till the following day.

The statute, 28 USC 144, wisely refers to the "belief that bias or prejudice exists." When a litigant or his attorney (in my case it was both) believes that he cannot have a fair trial before a judge he then and there cannot have a fair trial. He is automatically handicapped in his presentation, his preparation, his testimony. For that reason in many states, including Oregon, the mere statement in the affidavit of the belief that the litigant cannot have a fair trial before a specific judge is a sufficient allegation of fact to disqualify a judge. Oregon Revised Statutes 14.260 merely requires the affidavit to state that "such party or attorney cannot or believes that he cannot have a fair and impartial trial ...before such judge." See also:

State v. Weiss, Vol. 84 Advance Sheets Aug. 2, 1967,
No. 18, page 1057

Bi-lateral pre trial conference and time of trial.

My assignment of error 2, op br 7, appellees' brief 10.

After disqualifying himself Judge Kilkenney, on Friday April 21, 1967, set the pretrial conference for 9 a.m. April 24th before Judge Belloni. I was in California at that time and, the day before, sent a memorandum to the clerk for presentation to the court if it held a pre trial conference. See Tr Vol I, 34. I do not believe that after a judge disqualifies himself as Judge Kilkenney did, he has the right to assign a case to a specific judge and set a hearing before that judge for a specific time. I believe the setting for April 24th was invalid. I took my chance on that score but I did prepare and mail a memorandum to the court. Whether it be for good reason or necessity I did not return on Monday, April 24 and if an assignment for such hearing, not by the judge who was to conduct the hearing, but by the judge who had already disqualified himself in the case, is valid, then I am bound by the pre trial conference of that date if it were held. But it was not held that day. Appellees contend that I should have been punished for not appearing on April 24. The punishment should in no event go beyond holding the hearing on that date. It should extend to the holding of a hearing on another date of which I had no information. The latter is what happened.

The court set the pretrial hearing for Friday morning, April 28. Both the court and the clerk knew that I was in California on April 24 and that I expected to remain that week, except that I was to return Friday, April 28 to participate in hearing the oral exams of a student at Reed College who was seeking his degree. See Tr Vol I, 21-36. Yet the pretrial conference was set for the morning of April 28 and the only notice was a card sent to my office on April 24 or 25. I had no employees and my office was closed during the time I was gone that week and I didn't receive the card till the afternoon of April 28 when the hearing was over.

A punishment should fit the crime. I should not be punished for the April 24 non appearance by non notification of the April 28 hearing. It was known that I was away for the week except for the required return for the Reed College examination on April 28. The proper procedure would have been to attempt to phone my office to ascertain what time Friday I would be back and what time the Reed College examination was. It would then have been ascertained that my office was closed since I had no employees. See Tr Vol I, 23. Sending a card on April 24 or 25 did not result in notice to me before the hearing was held.

The court said, Tr Vol I, 18, "And if Mr. Lenske did not know a conference was to be held, certainly one should be held." But the court did not follow its own principle. Was it prejudice or merely unjust punishment. And so the court denied me a pre trial conference and denied my affidavit of prejudice and required me to go to trial that morning of May 16, 1967 before I had opportunity to read the reporter's transcript of the April 28 conference between appellees' counsel and the court. The result was a denial of due process.

Refusal to admit Exhibit 120

My assignment 2 1/2, page 8; appellees' brief page 16.

Knutsen testified, Tr I, 110 , 100, that the Crawford sale was for \$12,500 and the proffered exhibit showed it was \$11,500. That contract was valid evidence for impeachment purposes and also to show services for Knutsen on my part and also for intent on Knutsen's part and on my part. This was a contract I had drawn for Knutsen. Certainly if the court were willing to hear my defense that I had attorney fees coming for my services in connection with this property it would have admitted that contract.

MY RIGHT TO A JURY TRIAL

My assignment of error 3, op br 9; Appellees' br 3-4.

Even though this issue cover but a page in my brief and a little over page in appellees' brief I believe this is the most important legal and constitutional point in the case.

The tort issue against me was peculiarly a jury issue and one which would not have knowingly waived.

FRCP 38

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand must be indorsed upon a pleading of the party.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury...

FRCP 39

Rule 39. Trial by Jury or by the Court

(b) ... but, notwithstanding the failure of a party to demand a jury trial in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

Tr Vol I, 6

MR. LENSKE: I would like the record to show that the Knutsens, through their counsel and their pleadings, indicated a demand for a jury trial. I did a close perusal of their pretrial order that they prepared would indicate that. And until my return from California, the Clerk had indicated that this was going to be a jury trial, that he was going to have a jury. And only during the trial I think it was the past week had I received an indication from the Clerk that he was not going to treat it as a jury trial, because neither side had filed a demand for a jury. And then as soon as I could, I filed my demand for a jury trial. However, I believe that since there has been an issue between the parties as to whether this is a law proceeding or an equity proceeding, that I felt that

a ruling by the Court that it is a jury case.

As long ago as December 30, 1966 service was made upon me by appellees' counsel (See certificate of service by mail, R 114) of their proposed supplemental pre-trial order. This contained proposed paragraph V which stated:

"V

The following are issues of fact to be decided by the jury."

Then follow issues of fact including the issue of which the court found judgment against me. (R 113)

This in itself could well be construed as a request for a jury by appellees or, at the least, the basis for estoppel to claim that I was not entitled to a jury trial because of lack of earlier demand by me.

Promptly after I learned that question was raised about a jury trial I filed my motion of May 12, 1967 (R 60 in which I asked for a pre-trial conference, a setting over of the trial itself and, in my supporting affidavit I said; "that in any event I demand a jury trial."

For the many months that the case was pending plaintiffs' attorneys proceeded on the basis that they would have a jury trial on most of the issues of fact (R 113), I presumed that there would be a jury trial if there would be a law case issue (Tr Vol I, 6), and the court itself and the Clerk proceeded on the basis that it would be at least in part a jury case (Tr Vol I, 8). But the following did occur: (Tr Vol I, 8, line 22)

THE COURT: The Court will have to acknowledge that it was assumed by the Court originally that this would be a jury trial. Only when I examined the file and noticed that no demand had been made under Rule 38 did I personally inform the clerk not to call a jury for today. But Rule 38 is the rule. I see no particular reason to waive it.

Under the facts of this case it was a clear abuse of discretion, given the court under Rule 39 (b), for the court to reverse the thinking of everyone involved in the case, including itself, and apply rules 38 and 39 strictly against

But there is another reason why I was entitled to a jury trial as a matter of right. The rule (38) requires a demand for a jury within 10 days after the last pleading is filed. Under the practice in the District Court of Oregon the pleadings are of little consequence, the issues being formed in the pre trial order and the pleadings thereupon being entirely eliminated. I have already pointed out (R 113) that the proposed pre trial order of appellees included a jury trial on the major issues.

I did not know until the day of trial whether the case was a law case, an equity case, or part law and part equity. The court did not make its pre trial order until May 16th, the morning of the trial. It held the ex p pre trial proceeding on April 28, 1967 but no order was entered til May 1. I ordered a transcript of what occurred on April 28, 1967 immediately and I found out that a pre trial conference had been held, if what occurred was properly within that phrase. But the reporter did not complete the transcript till May 15th or deliver it to me till trial time, May 16th. (Tr Vol I, 10,

The application of Rules 38 and 39 to our type of proceeding, to be finally should be construed to mean that the demand must be made within 10 days after the pre trial order is made up. In the instant case it was not known until trial time, May 16th, that there was a jury issue. It should not be incumbent upon a litigant in a case that commenced as an equity case to make what might be a useless act, file a demand for a jury - just in case. The rule of reason should prevail - that a demand for jury need not be made till the court determines that there is an issue which normally may be tried as a fact issue in a law case.

THE STATUTE OF LIMITATIONS

My assignment of error 4, op br 10; Appellees' br 18 - 23.

The first point of appellees is of no consequence. Since neither the Heddons or I ever contended that the property in issue was anyone else's but Knutsen's there never was an issue on that score. The sole issue was whether Knutsen owed me any money for services or advances and, if so, whether the property stood good for either or both. The two year statute quoted by appellees in their appendix, ORS 12.110(1) as modified by ORS 12.040(4) is applicable. The two years would commence running from the date of the discovery.

I find it more difficult to urge and reurge the statute of limitations assignment than other assignment of errors even though on the combination law and fact there should be no doubt about the correctness of this assignment of error. The reason for the difficulty is that it could be inferring the thing that's wrong about Knutsen's case against me is that the law lapsed on him. Since I did nothing but good for Knutsen and since the only fraud is his attempt to beat me out of advances and fees, why should I resort to this clear and unqualified defense of the statute of limitations. I suppose that the reason is that judges occasionally lapse into injustice (Two have already done that to me, one in this case) but the unjust results are sometimes righted by the law, even procedural law.

Sometimes an untruth returns to plague the untruthsayer. Knutsen's counsel asked him (Tr Vol I, 57):

Q Have you or have you not at any time requested of Mr. Lenske that he secure for you a deed back to this property which is the subject of this suit?

A Well, yes. Just before we moved back on to the property I asked him about it.

The question was, did he request and the answer was yes. This was supposed to have occurred in April, 1963, a year after the conveyance by Knutsen to Heddon. The answer that Knutsen said I gave was that I said

(Tr Vol I 57 line 21) "Well, he would look into it and let me know."

If I defrauded him and he was entitled to reconveyance at that time this was the time to take notice. But if not then, how soon after that? How long should it have taken to at least be suspicious when nothing happened about the "and let me know." Would a month be enough, three months, six months, twelve months? In any of those categories the statute of limitations will have run.

Appellees' counsel inferred that the April 1963 presumed instance was a request and that the January 1965 one was a demand. But in both instances the leading question by counsel was, did he request and in both instances the answers were yes. See Tr Vol I, page 57, line 24, when he was asked, "Did you at any other time request...?" Knutsen used the same kind of language to the second request, i.e., page 58, line 6, when again he said, "I asked..." He had also used the words "I asked..." on line 19 of page 57 relating to the presumed conversation of April, 1963.

I do not believe that a just court can make the fine distinctions that counsel for appellees have tried so hard to make that would "lull" Knutsen into somnolence from May, 1962 when he received the letter from the Government agency until April or May of 1963 and then when he made the inquiry (he says) in April 1963 that he "lull" again for another year or more.

The fact is that not all the Richard Riches are lawyers (See "A man for all seasons" in the movies if you have not). Some of the Richard Riches are young men who know enough to pay a cash finder's fee to an employee to clear the way for a sale to the employer, the fee being a mere \$500. It is not difficult for such an innocent Richard Rich to bite that hand that fed him in the guise of innocent betrayal. This is the same young man who did not pay his childrens' support money, he did not pay the Government mortgage and the taxes on the property, he did not pay Nine Koch from whom he had borrowed money, he did not pay his lawyer. He did get the use or profit

or income from the property during all the years involved. Yet he uses me as the excuse for not making payments on the mortgage of \$100 a month when I succeeded in getting the installment arrangement for him. The court will notice that during all the years Knutsen had the property the balance he owed was almost as much in any year as it was after he made his downpayment. But the instant issue is not the morality of this case but the statute of limitations. I know I'm a hundred per cent right on the running of the statute of limitations - it has run because more than two years has elapsed since the basis for the cause should have been discovered by Knutsen if his own testimony is to be believed. But I am not satisfied with that as the sole reason for my vindication. The truth is that the only fraud was that played upon me by Knutsen and his present counsel and which was sanctified into judgment by the trial court.

The court denied me the right to state my contentions

My assignment 5, op br 12, appellees' brief 23.

This assignment is so fundamental that I become amazed whenever I think of it. It is one thing for a court to hold that a litigant's contention is invalid in law or in fact. But it is another thing for the court to make a pre trial order that eliminates a litigant's pleadings and says to the litigant, "You may not set forth before this court what your contentions are." It amazes me that a Federal judge will do that, that a group of lawyers will argue the correctness of such action. Now to the merits of some of my contentions.

My first point was that all issues between Knutsen and myself could and should have been determined in one case in the State Court, including the right of redemption and the right to any surplus upon sale. My second point was that in no event should an issue of damages between two defendants be tried out in a Federal Court between citizens of the same State.

My contentions 4 and 5 are that if the court does accept jurisdiction of a tort claim against me by Knutsen it should likewise consider my tort claim against him for defrauding me.

Then I contended that Knutsen did not come into court with clean hands and that he is seeking equity but not offering to do equity.

I also contended that the court had no jurisdiction to consider the claim for punitive damages.

I shall now consider some of the authorities and arguments of appellants on the foregoing. On page 28 of their brief appellees state under point 2 that Knutsen's cross-claim for damages against me arose out of the transaction or occurrence that is the subject of the original action. Then they say, 'This may seem startling at first, because of a natural tendency to assume that Knutsen's having given a note and mortgage to F.H.A. was the transaction which was the subject of the original complaint.' Appellees are right. The subject of the suit is the note and mortgage signed by Knutsen to the Government and the jurisdiction stems from the complaint which alleges just that and that is the transaction from which everything else must stem. There is no allegation that I represented Knutsen in that transaction. The citations about the meaning of 'transaction' being flexible and liberally construed just don't go that far afield from the simple language of Rule 13(g). There is nothing in the complaint about the reasons for nonpayment. There is nothing in the complaint about Knutsen trying to cheat his attorney who helped save the property for him during three lean years and there is nothing in the complaint about Knutsen's attorney trying to cheat Knutsen out of his property. Nor is there anything in the complaint about any quarreling between Knutsen and his ex-wife or with his present wife, any one of the foregoing items being the possible motive or side reason for the payments of principal, interest and

taxes having been neglected or intentionally avoided. Would counsel for appellees claim that the issue of divorce, amount of support money, etc. could be cross-claimed between the parties when the "occurrence" that prompted the failure to make the mortgage payments stemmed from one of those motives?

On page 30 of their brief appellees justify their cross-claim for damages because the damage claim is "related to" the property. I suppose that the same argument could be made that when the special right of the Government to foreclose its mortgage in Federal Court is taken against the mortgagor and the tenant in possession, both local citizens, the tenant could cross-claim against the mortgagor for personal injuries or the landlord-mortgagor could cross-claim against the tenant for slander when he sought to collect rent.

Appellees attempt to liken their claim to the foreclosure of a second mortgage in the same suit. Knutsen was never a second mortgagee; he was always the owner; either Heddon or I was the second mortgagee. If the court could consider ancillary claims it would be whether at the posture of the case at trial time Knutsen owed me any money for services or advances relating to the property and whether by subrogation or agreement or attorney's lien the property stood good for such claim. As to that the court found against me as to the lien but it specifically stated and found (Tr II, 285):

"I am in no position to state and certainly in no position to arrive at any figure should he owe him money for this purpose. That is not a question to be determined by this court, at least in this proceeding."

Then on page 31 of their brief appellees quote from authorities that 13(g) was intended "to avoid circuity of action" and "to prevent multiplicity of litigation and to bring about prompt resolution of all disputes arising from common matters" and "Our courts should be vitally concerned to see to it that disputes between parties be resolved in as few lawsuits as possible

These are all good statements of good law. The fallacy of appellees contentions are that the court stretched the principle in their favor and refused to apply the principle for me. It assumed a tort case against me but it refused to consider a tort case by me against Knutsen. It refused to decide or rather to allow as a contention on my part, the issue of fees and advances, although it signed a decree that there was no convincing proof of services by me. In short, the court specifically adopted the program of piecemeal litigation. It took the claim of one side for litigation and denied consideration of the claim of the other side. I believe that my contention was right that only a State Court could try all issues between the parties defendant in one case; the issue of right of redemption, the issue of damages from me to Knutsen, damages from Knutsen to me, the issue of services by me or advances by me. The court, in its prejudice eyed but one direction - how to get at me, not where complete justice between the parties lay on all issues raised between them.

On page 32 of their brief appellees claim that exemplary damage jurisdiction does lie in a Federal equity case even though it might not in a state case. In arriving at that conclusion appellees stress the breadth of the scope pronounced by the rules when they say on page 35, "Rule 2 provides 'there shall be one form of action to be known as civil action:'" Rule 8(a) establishes that "relief***of several different types may be demanded;" Rule 8(e)(2) authorizes a party to "state as many separate claims ***as he has***whether based on legal(or) equitable grounds***;" and Rule 18(a) makes clear that "a party asserting a claim to relief as a original claim, counterclaim, cross-claim, or third-party claim, may join *** as many claims, legal (or) equitable***as he has against an opposing party."

The trouble with appellees' reasoning is that they stop when the prin

applies in reverse. What happens to these broad statements when you consider my claim for attorney fees and advances, my claim of a fraudulent sale by Knutsen to me? Appellees and the trial court refuse to acknowledge that what is sauce for the goose is sauce for the gander. But appellees are mistaken when they reason that the issue of punitive damages is merely a procedural matter.

When a court grants a judgment of \$250 compensatory damages and \$5000 punitive damages the \$5000 is pretty substantive. Punitive damages are not favored in the law because of their inherent vindictive character. They constitute payment of a fine - not to the public trough - but to the private pocket of one whom the court says it has already fully compensated. That is why courts will, in the State of Oregon, deny punitive damages in all equity cases but will also frequently deny them in jury cases. Thus the court said in:

Becker v. Pearson, 241 Or 215, 220 (1965)
405 P 2d 534

page 220: '***punitive damages are not favored in the law.'

Smith v. Abel, 211 Or 571, 595
316 P 2d 793

page 595: "***the jury awarded the sum of \$2000 as punitive damages***

It is axiomatic that punitive damages are not favored in the law. Reversed."

Perry v. Thomas et al, 197 Or 374, 391 (1953)
253 P 2d 290

page 391: "Punitive damages are not recoverable merely because a conversion took place.

page 395: "The judgment ***will be corrected by eliminating punitive damages (\$5000)."

O'Harra v. Pundt, 210 Or 533, 550 (1957)
310 P 2d 1110

This was an action in trover for killing impounded dogs (referred to in the case as "man's best friend."

issue of punitive damages to the jury."

page 551: "The judgment for \$1000 compensatory damages is affirmed.
The judgment for punitive damages (\$5000) is reversed."

Dietzman v. Ralston Purina Co.
84 Oregon Adv. Sheets 497, March 22, 1967
425 P 2d 163.

page 497: "Plaintiffs executed and delivered to defendant a chattel mortgage covering a flock of chickens owned by them. Plaintiffs contend that the chattel mortgage was invalid; that defendant refused to release the mortgage; that as a result plaintiffs were unable to obtain feed on credit and were forced to sell their chickens."

It is plaintiffs' theory that defendant's conduct which resulted in forcing plaintiffs to sell their chickens constituted a conversion.

The mere assertion of an unfounded lien does not constitute a conversion. Richstein v. Roesch, 71 S.D. 451, 25 NW 2d 550, 169 ALR 98 (1946) is closely in point. See also, Restatement (Second), Torts Sec. 224 (1965)."

In the above case the plaintiffs sought \$3635 compensatory damages and further alleged in their amended complaint: (Ab of Rec 20)

"That the acts of defendant***in asserting rights under a chattel mortgage and in refusing to release said chattel mortgage of record were oppressive, fraudulent, in wanton and reckless disregard of the rights of plaintiffs, defendant having no claim whatsoever to said chickens, and by reason thereof plaintiffs demand exemplary and punitive damages from defendant in the sum of \$25,000.00."

My claims against Knutsen

Under their point 4 on page 41 of their brief appellees refer to my brief, page 13, and the claims I have against Knutsen which the court would not permit the dignity of a contention.

All of the citations of appellees, all of their arguments to sustain the court's jurisdiction in the claims of Knutsen against me have equal force in admonishing the court to consider my claims.

He who seeks equity must do equity.

Also

Clean Hands Doctrine.

I included amongst my contentions the clean hands doctrine and the maxim that he who seeks equity must do equity. The court denied me the right to make those claims. Here again we come to the fundamental question of whether a court can throw out a pleading and then decide in a pre trial order what a litigant's contentions are. This is such a fundamental denial of due process that it is difficult for me to believe that a Federal District Court judge would do such a thing. Appellees condone the court's action in pages 43 to 46 of their brief. They say on page 45 that requiring Knutsen to pay attorney fees under the guise of doing equity "would be the same thing as permitting the defendant Lenske to obtain a cross-claim for those fees." My cross-claim should have been permitted based on the contention of appellees that circuitry and multiplicity of actions should be avoided. But regardless of that error it was also error for the court to refuse to apply the equitable maxims. Also, it must be remembered that the court denied me the right to make the contentions. To say afterwards, well, the record shows you weren't right anyhow is like inducing an abortion and saying the embryo had not matured. It is with that analogy that appellees wind up the point with the finding of fact No. 6 as quoted on page 47 of their brief,

"There was no convincing proof of the amount or value, if any, of legal

defendants Knutsen***! (R 79). Only a clearly closed ear could not hear the
and only closed eyes could not see/obvious through the exhibits introduced
and the testimony of Jo Anne Click, former wife of Knutsen. See Tr Vol
124:

BY MR. LENSKE:

Q Do you have in your favor a judgment or decree requiring support
money payments for your children?

A Yes.

Q What was the original amount of that requirement of the decree?

A I believe it was \$150 a month.

Q Do you remember ever receiving any money from me to pay up the
amounts owing at any particular time?

A Yes, I do.

A It was October of 1962, and it paid the child support up to September
1st, and it was in the amount of \$2025...

Q ...And I gave you my check for \$2,025 at that time?

A You gave me your check, and on the bottom, it said something about
the Knutsen account.

The total cash outlay by me for Knutsen was over \$4000 but that simply
didn't interest the court. Following are some authorities in Oregon reg
fees.

Hay v. Erwin, 244 Or 488 (1966)
419 P 2d 32

Erwin, an attorney, entered into a contingent fee agreement with his
client on a contingent basis in a divorce case. He claimed a lien. The court
held the contingent fee agreement void but found that \$30,000 was a reasonable
fee and awarded Erwin \$30,000 on quantum meruit.

Jackson v. Stearns, 48 Or 25, 29, (1906)
84 Pac. 798

Page 29:

"But since the time of Lord Mansfield, it has been the practice
of courts to intervene to protect attorneys against settlement
cheat them out of their costs.

Hamilton v. Holms, 48 Or 453, 461 (1906)
87 Pac. 154

Page 461:

"***if Mrs. Hamilton had stipulated to give the defendants or
half of the entire real property which they could secure for her
the compensation would not have been unreasonable, in view of

the measure agreed upon."

Knutsen admitted he owed me fees. See Tr Vol I, 56-57.

Q (By Mr. Pearlman) At any time have you performed services for Mr. Lenske?

A Yes.

Q (page 57) Did you ever submit a statement or bill to Mr. Lenske for your services?

A No, sir.

Q Why not?

A Well, I figured that it would just kind of help pay what I owed him for attorney fees.

An additional authority is:

Bingham v. Salene, 15 Or 208, 217, 218 (1887)
14 Pac. 521

I might here call the court's attention to Knutsen's testimony on page 51, Vol I, Tr:

Q Have you or have you not ever requested from Mr. Lenske a bill for services rendered?

A Yes, sir.

In my motion for a new trial (R 83) I sought to introduce and used as one of the bases a portion of the deposition of Knutsen that contained the following: (R 86)

Q Did you ever offer to pay me any fees?

A ***I have never been billed.

Q Did you ever discuss with me the matter of paying fees?

A No, I don't believe so.

Q Did you ever ask me what I would charge?

A No, I don't think so.

Q (page 87, line 12) And that at no time was there any discussion between either of us as to what you would pay for fees?

A No.

Q I at no time told you and you at no time asked me what the fees would be?

A No.

Q By "No", you mean that it's correct that nothing was ever said between us relating to fees?

A That is correct.

Q And also you have never paid anything in fees?

A No, I haven't.

Q And you have never offered to pay anything as fees?

A No, I haven't.

This testimony in the deposition of Knutsen was overlooked by me and I believe it was important in judgment of Knutsen's credibility and in judging the factual situation relating to our dealings and that the court should have allowed a new trial and, at the least, reopen and permit this testimony to be a part of the record.

The motion for new trial should have been and should be allowed

Knutsen is entitled to neither compensatory or punitive damages

My assignment 6, 14, ope br; appellants' brief 48.

Before I discuss damages I shall answer the footnote on page 51 of appellees' brief in which they state:

"The Knutsens could not continue to occupy their home in any status other than as tenants because they could not refinance and thereby redeem the property from the government. They attempted to refinance, but 'couldn't get a loan anyplace, because the title wasn't in my name.'" (Tr.-I, p.60)

I had, both in open court, and in the writings I submitted to the court see R 51, bound myself as follows:

"Reuben Lenske offers to do equity as follows: to subordinate any claim he may have in the property for either services or advances, to any first mortgage which the Knutsens need to execute on the property to enable them to pay off the plaintiff or to redeem the property if an execution sale is held* * *"

Mr. Pearlman said at the April 28, 1967 proceeding before Judge Bel (Transcript of Proceedings April 28, 1967) (page 21)

"I'm not at all sure as to what Mr. Lenske is driving at in his No. 4.

The court says: (page 21)

"I am not sure what he means either, unless he offers to give you the relief that you told me you wanted awhile ago."

The language is simple and direct. I offered to subordinate any right I might have to any encumbrance Knutsen needs to place on the property to pay off the mortgage to the Government or to redeem from a sale.

This meant that it was simply not true that I was standing in the way of Knutsen refinancing. Moreover, there is not the slightest hint that such request was ever made of me at any time before, during or after the Government's foreclosure suit was filed. My good faith is clear and was all the time. Knutsen's was not after I had saved the property for him and he learned that I was right about it having value and it appeared that he might have to recompense me in some fair manner.

Now let us look at the last portion of paragraph 4, R 51, in which I said:

"and if Magner Knutsen does not choose to pay the plaintiff or to redeem even the jurisdictional question of the interest of defendants or any of them in the property would be moot."

This should not be too difficult to understand if one wishes to understand it. If Knutsen really wished to pay up the mortgage I was not going to be in his way. He could pay up or redeem, whichever was necessary. Any claim I had was to be subordinated to a mortgagee who would finance. There would then be no occasion for any lawsuit by or with the Government. But what if Knutsen didn't want to pay the Government off or redeem the property? Then the existence of the Government suit was merely a ruse for the purpose of getting me into Federal Court on a tort claim by Knutsen and/me. ^{against} As appellees hoped, my tort claim for bribing my employee to make a sale to me was thrown out by the Federal Court but it would not have been in the State Court. The ruse worked.

Now back to the damages claimed to have been proved, i.e., judgment for costs by the Government against Knutsen for \$182.88. If the sole cause for the suit was my claim of an interest in the property all knutsen had to do was ask me to subordinate and acknowledge, as I always did, that any claim on my part was a security claim only. No one doubted that the Government's right was superior. Certainly, if the Crawford deal were concluded as

originally contemplated (See exhibit 120 if the court decides it should have been accepted in evidence) , Ex 121, 163-172, 182, etc., then there would have been a direct conveyance from Heddons to Crawford or back from Heddons to Knutsen and from Knutsen to Crawford. Since the Federal Land Bank was to make a loan to Crawford (Ex 182) it was the Government's business to see that title was in proper shape for the closing of such a loan and the inquiry by Mr. Madson in that letter, "Who is Harold Heddon and on what conditions did you give him a title to the property?" was proper. By the same token it was proper to inquire in the letter about the judgment for \$150 a month support money and the previous contract with Puckett.

But the only legal reason the Government had or could have had to foreclose its mortgage was the default of Knutsen and that started in the year 1960 and was present thereafter at all times. The Government had the right to incur those costs against Knutsen at any time after the initial delinquency in 1960. That it may have chosen a particular time for a particular purpose to sue Knutsen and incur those costs does not excuse his liability from the moment of delinquency. We must remember that:

1. The note and mortgage were Knutsen's obligation, not mine and it was on this obligation of his that the costs were incurred.

2. He was delinquent on the note and mortgage before I had any attorney-client relationship with him.

3. If there were any validity to all the other arguments on his part it was still his own duty to mitigate the damages. He should have made his payments and there would have been no court costs. If he had a case against me he could have sued me and made his legitimate recovery if he was right.

4. The excuse that he would be making the payments and I would be the property is in the face of the fact that he was receiving the use of the property. He was living on it; he was getting the benefit of the crops on

5. THE ONLY REASON THE GOVERNMENT HAD NOT FORECLOSED BEFORE IT DID WAS BECAUSE I MADE PAYMENTS FOR HIM AND BECAUSE I INTERVENED FOR HIM AND BECAUSE I HAD HIM SEEK AND OBTAIN THE ASSISTANCE OF SENATOR WAYNE MORSE TO INTERVENE FOR HIM.

6. During the years involved, 1962 to 1966, Knutsen was delinquent in paying the following:

a. Support money for his children. He was obligated under the decree to pay \$150.00 per month. After I paid \$2025.00 to clear him to September 1, 1962 he made no further payments until after December 10, 1962 when his ex wife filed a statement of delinquency and asked that execution issue. See exhibit 177. He made no payments on support money in 1963. See ledger of exhibit 177. He made no payments until he was cited in court and ordered to \$100.00 per month. Thereafter he paid \$100.00 per month but was that the reason he found it impractical later to pay \$100 per month to the Government on his mortgage?

b. He didn't pay Mrs. Cook from whom he borrowed a substantial sum of money.

c. He didn't pay me.

d. He didn't pay the Government.

I have nothing but sympathy for someone who cannot manage to pay his obligations. I helped him during several of his difficult years. But failure to obligations was chronic with him. To attribute his mortgage foreclosure costs to me is remote beyond reason.

Since there were no damages proved as general or compensatory damages no exemplary damages can follow.

In the footnote on page 54 appellees point out that a mortgage takes precedence over subsequent accruals of support money payments. This is true but the mortgagee would have to foreclose to clear title or pay up the

accruals to clear title. The correspondence I had with the District Attorney of Columbia County, who represented Knutsen's ex wife, discloses that (Ex 183-184) although she had agreed to reduce the payment to \$75.00 she was unwilling to have the decree modified accordingly. That she could have enforced the full \$150 payments on property of record in Knutsen's name. It was perfectly valid and a wise precaution to take for a client and one for which I should be rewarded rather than be designated as a fraud. The fraud in such instance exists only in the mind of the fraud sayer.

Commencing on page 53 appellees again discuss fraud. They cite authorities on the responsibility of an attorney. An attorney, of course, should not defraud his client and a client should not defraud his attorney; nor should a third attorney seek to aid a client in defrauding his attorney. There was a time when men who could read and write could and sometimes did take advantage of those who couldn't. Those days are over. Means of communication today and the degree of education and literacy today have equalized to a major extent knowledge of the ways of doing business. A lawyer today can be the victim of a dumb appearing client more often than the client be the victim of the lawyer. The standard to be applied today should be an equal standard. Every person should deal honestly with each other person, no matter the profession.

For me to cheat Knutsen out of his equity, which but for me he would have given up to Crawford at the urgence of the Government Loan agent \$1000, in the manner attributed to me by the evil thinking persons who are against me in this case would prove me, not a knave at all, but a fool. I committed myself to the U. S. Attorney, to the Government Loan Agent, that the transfer was a security transaction and the testimony of Heddon unqualifiedly proves that. How could any person not an imbecile or utter insane expect to defraud another person through the supposed means that

was here attributed to me. Knutsen needs no guardian, he has done pretty well for himself in having the use of property and benefiting from its being saved for him till it reached a substantially high value. I would be the one who needs a guardian to look after me if I even dreamed that I could engage in such obviously impossible means of getting someone's property and succeed.

Wrong Findings of Fact

My opening brief, 15, Assignment of Error 7; Appellees' brief 57.

Appellees merely assert in their brief that the findings are supported by the evidence. I stand by what I say in my opening brief. I'll add but a few comments. Appellees say on page 59, "True, Lenske disbursed funds for the account of Knutsen, but they undoubtedly were the monies which Lenske, himself, owed on the Willark property he had purchased under contract from Knutsen." Knutsen testified that the balance on the contract was \$3700 to \$3800. I testified that it was \$3881. It was payable \$50 per month including 6% interest. Knutsen testified that he agreed to discount it \$1000 for cash. I disbursed during the period involved a total of over \$4000 for Knutsen. The uncontradicted testimony is that I intended to use the Heddon money to close the deal with Crawford but that since the Crawford deal did not materialize and Heddon demanded his money back plus the \$100 bonus interest after the 60 day extension I gave him his money back. If I was going to help Knutsen I had no choice then but to use my own money. This I did. The contract I had with him was long term, low interest and a cash discount of approximately 25% was not unreasonable between any two persons. Appellees do not contend that it was unreasonable. The money I advanced above \$2881.00 was money of my own for which I was to be reimbursed when Knutsen was fortunate enough to make a good deal. The contract was the same one that I entered into without having seen the property

but which Knutsen got me to buy by paying my employee a \$500 cash "finders fee." My business dealing with Knutsen was fair, his with me was not.

My motion for new trial

My brief, 17, Assignment of Error 8; appellees' brief 61.

In connection with the motion for a new trial I asked for time within which to amplify it. I filed it within the time provided by the rule because I saw from the attitude of the court toward me that if I merely asked for time and didn't file the motion he would deny me the right to file any at all. I order a transcript and hoped that if I had it before me and could document my points, hoping against hope, prejudiced though he was, the court might see the light. The court controls the court's own reporter's order of preference. In this instance the court made sure that I would not have a transcript available for amplification of my motion or for use in arguing the motion. It denied my motion for extension of time and set the hearing on the motion for new trial before the reporter completed the transcript. I do not know that this would have any legal effect but it should shed some light on the prejudice aspect of the case.

Knutsen's credibility gap

My assignment of error 9, op br 18, appellees' brief 63.

A good deal of this case can be determined from facts and circumstances outside of the evidence adduced in person by each of the parties. Allowance should always be made for the emotional effect of the interest of parties affects their memory, especially on matters long gone by. That is one of the basic reasons for the operation of the Statute of Limitations. After making allowance for interest and memory, Knutsen must for factual basis pit his testimony against mine to prove fraud. In the Harry Bridges case the courts' reversals on appeal were based primarily on the unreliability

the witnesses against him. Appellees did not point out in one instance wherein my testimony was impeached or was inconsistent with obvious facts. In this brief and in my opening brief I have shown intentional misstatements by Knutsen in some instances and such other inconsistencies as to make his testimony unuseable for effectively demeaning me. I believe my assignment of error 9 was well based and that the only reason appellees did not answer it directly is that Knutsen's credibility and his testimony against me cannot stand scrutiny and close observation.

What sense, for instance, is there in his testimony that I advised placing his property in the name of a fictitious person? How does one get property back from a fictitious person? By forging non-existing persons' names and getting them falsely acknowledged? Was the reward in sight so great that a lawyer who is all evil but 50% competent would stoop that foolish as well as low?

Bear in mind that I wrote to FHA, Ex 162, "Magner Knutsen wishes to retain the property." This was after they had written, Ex 160, "I believe Crawford's are still interest in purchasing the property and have indicated to us that they might be willing to give \$1000 for Knutsen's equity...I believe that this would probably be the best way out for Mr. Knutsen."

I wrote to Albert Brown, Ex 138, "I am writing you again regarding the rent that you owe for the house that belongs to Magner Knutsen." I wrote to James Seller, Ex 184, "I am satisfied that he (Knutsen) has not rented the house out yet." See also letter to U. S. attorney, Ex 115.

In looking at the deed to the Heddons, Ex 102, it will be noted that the deed was subject to the Crawford contract of sale, which shows that it was in contemplation of closing that sale.

There is not one iota of believable testimony of fraud on my part and the law is stated in :

page 657:

"It is elementary law that fraud is never presumed and that it must be alleged and that the particular fraud must be proved by clear, satisfactory and convincing testimony."

Whether or not I was right, I believe I had a sound basis for a claim under 83 CJS 575, Subrogation, at 624

"One who, acting in a representative or fiduciary capacity, incurs and satisfies obligations to the benefit of his principal, is subrogated to the rights of the principal against others primarily liable, and to the rights of the creditor against the principal."

579:

"Subrogation is founded on principles of justice and equity."

CONCLUSION

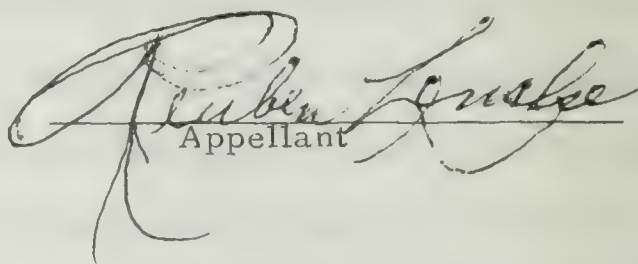
I have written too much and yet I have not written enough.

It was only a piece of string (Henri de Maupassant).

It is hard to believe that any judge would believe it is anything else.

It is harder to believe that three judges could follow suit although it is much easier to perpetuate an error in the law than to correct it.

Respectfully submitted


Appellant

No. 22208

IN THE
United States Court of Appeals
for the Ninth Circuit

EDOCO TECHNICAL PRODUCTS, INC.,
Plaintiff-Appellant,

VS.

PETER KIEWIT SONS' CO., and
THE B. F. GOODRICH COMPANY,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S OPENING BRIEF

FULWIDER, PATTON, RIEBER, LEE & UTECHT
FRANCIS A. UTECHT
820 Edison Building
100 Long Beach Boulevard
Long Beach, California 90802
Attorneys for Plaintiff-Appellant

LONG BEACH REPORTER

FILED

FEB 19 1968

WM. B. LUCK, CLERK

TOPICAL INDEX

	Page
Jurisdictional Statement	1
Statement Of The Case	
A. History Of The Controversy	2
B. Background Of The Invention	2
C. The Patent In Suit	8
D. The Patent File History	12
E. Defendants' Accused Structure	15
F. The Grounds For Non-Infringement Advanced By Defendants In Their Motion For Summary Judgment	17
Specification Of Errors	18
Summary Of Argument	19
Argument	
1. The District Court's Non-Compliance With Local Rule 4 Was Per Se Grounds For Reversal	20
2. The District Court Erred In Finding A File Wrapper Estoppel Against Claims 1 And 2 Of The Patent In Suit....	21
3. The District Court Erred In Finding Claims 1 And 2 Of The Patent In Suit Not Infringed	24
4. The District Court Erred In Finding There Was No Issue Of Material Fact On The Question Of Non- Infringement	28
Conclusion	37
Appendix	
Worson Patent 3,023,681, March 6, 1962	38
Local Rule - 4(g)	42

TABLE OF AUTHORITIES CITED

Cases

	Page
Cee-Bee Chemical v. Delco, 263 F.2d 150	29
Griffith v. Utah Power, 226 F.2d 66	28
International Manufacturing Co. v. Landon, 336 F.2d 723 (August 1964)	21, 22, 23
Neff Instrument Corp. v. Cohu Electronics, 269 F.2d 668	28
Nelson v. Batson, 322 F.2d 132 (August 1963)	24, 28
Sequoia Union High School District v. United States, 245 F.2d 227	28
Yardley Created Products Co. v. Clopay Corp., 324 F.2d 932	29

Rules

Federal Rules of Civil Procedure, Rule 54(b)	1
Local Rule 4(g) U. S. District Court, Central District of California	42

Statutes

United States Code, Title 28, Sec. 1291	1
---	---

IN THE
**United States Court of Appeals
for the Ninth Circuit**

No. 22208

EDOCO TECHNICAL PRODUCTS, INC.,
Plaintiff-Appellant,

vs.

PETER KIEWIT SONS' CO., and
THE B. F. GOODRICH COMPANY,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S OPENING BRIEF

This is an appeal by plaintiff from a Summary Judgment and Decree granted by the United States District Court for the Central District of California holding Claims 1 and 2 of United States Letters Patent No. 3,023,681 as being not infringed by defendants.

JURISDICTIONAL STATEMENT

Jurisdiction to review the judgment and decree of the District Court is conferred by 28 U.S.C. 1291. The judgment is a final judgment within the provisions of Rules 54(b) F.R.C.P. and the Rules of this Court. There is no dispute as to the jurisdiction of the subject matter or of the parties.

STATEMENT OF THE CASE

A. History Of The Controversy

Plaintiff-appellant filed its Complaint September 20, 1966 against defendant Peter Kiewit Sons' Co. alleging infringement of United States Letters Patent No. 3,023,681. On October 20, 1966 Peter Kiewit Sons' Co. filed an Answer and a Counterclaim for a Declaratory Judgment of patent invalidity and non-infringement. Defendant, The B. F. Goodrich Company on October 26, 1966 filed a Motion to Intervene as a defendant. This Motion to Intervene was granted December 22, 1966 and on January 5, 1967 The B. F. Goodrich Company filed its Answer and a Counterclaim for a Declaratory Judgment of patent invalidity and non-infringement.

On March 21, 1967 defendants filed a Motion for Summary Judgment on the grounds that the patent in suit is invalid, that neither defendant has infringed, and that even if the patent is valid and infringed plaintiff is guilty of misuse and therefore cannot enforce said patent. Plaintiff filed appropriate papers opposing the Motion for Summary Judgment and the District Court conducted a hearing on the Motion for Summary Judgment June 5, 1967.

On June 7, 1967 the Court filed a MEMORANDUM OPINION granting defendants' Motion for Summary Judgment upon a consideration of the issue of non-infringement only. A SUMMARY JUDGMENT and a second MEMORANDUM OPINION were both filed June 30, 1967.

B. Background Of The Invention

It is essential to a complete understanding of the

issues in this case that this Court be apprised of the background of the invention.

The invention relates to the field of concrete paving of roadways, airport runways, canals and similar elongated concrete structures. After a length of concrete pavement has been laid, the concrete will upon curing shrink. For many years because of this phenomena it was customary in laying an elongated strip of pavement to form such pavement in successive sections, i.e. a form was laid between which a first length of concrete was poured. After this first section of poured concrete hardened, forms were laid adjacent thereto and the next length of pavement was poured. It was necessary to space the adjoining pavement sections from one another to allow for thermal expansion of the cured concrete and additionally a water seal had to be provided between these adjoining sections.

The practice of forming successive pavement sections of necessity made the pouring of a long strip of pavement slow and costly. To overcome this problem it was proposed to pour a long length of pavement in a single pass and before such length had completely cured, slots were formed across the width thereof by means of power-rotated saws. These slots initially extended downwardly into the upper surface of the poured concrete and when the concrete cured and shrunk the contraction would cause the concrete to crack below and along the slots in a controlled manner. The resulting slots extended through the depth of the concrete and hence it was necessary to fill such slots with a sealing compound in an effort to make the resulting joint watertight.

As an alternative to sawing the slots, it was pro-

posed to insert a strip of metal within the concrete before it cured. When the concrete cured it would crack along the weakened plane formed by the embedded strip. As in the case of the sawed slots, a sealing compound was forced downwardly into the resulting slot in an effort to make it watertight.

The provision of the sawed joint and the joint provided by the embedded strip made it possible to continuously pour an elongated concrete pavement. Unfortunately, however, it was not possible using either of these techniques to provide a permanent watertight seal along the weakened plane joint. This was true because the horizontal movement between adjoining pavement slabs due to thermal expansion and contraction displaced the sealing compound. Displacement of the sealing compound also resulted from the action of rain and ice.

The invention of the patent in suit affords all the advantages of continuous paving with none of the disadvantages inherent to the sawed joint and the heretofore-utilized weakened joint strip former. The invention includes an elongated plastic fracturing band that is embedded in the concrete across the width thereof while the concrete is still soft. The plastic band is of integral construction and of general cruciform cross-section having a vertical band member and a pair of horizontal sealing strips that extend outwardly from the vertical band member. The horizontal sealing strips are formed with longitudinally extending serrations. As the concrete cures and thus contracts, the vertical band member causes the concrete to crack above and below its upper and lower edges.

The concrete as it hardens locks itself to the serrations of the sealing strips so as to form a waterstop between the pavement sections on either side of the plastic band. The simplicity and effectiveness of this invention will become apparent from the schematic drawings appearing immediately herebelow:

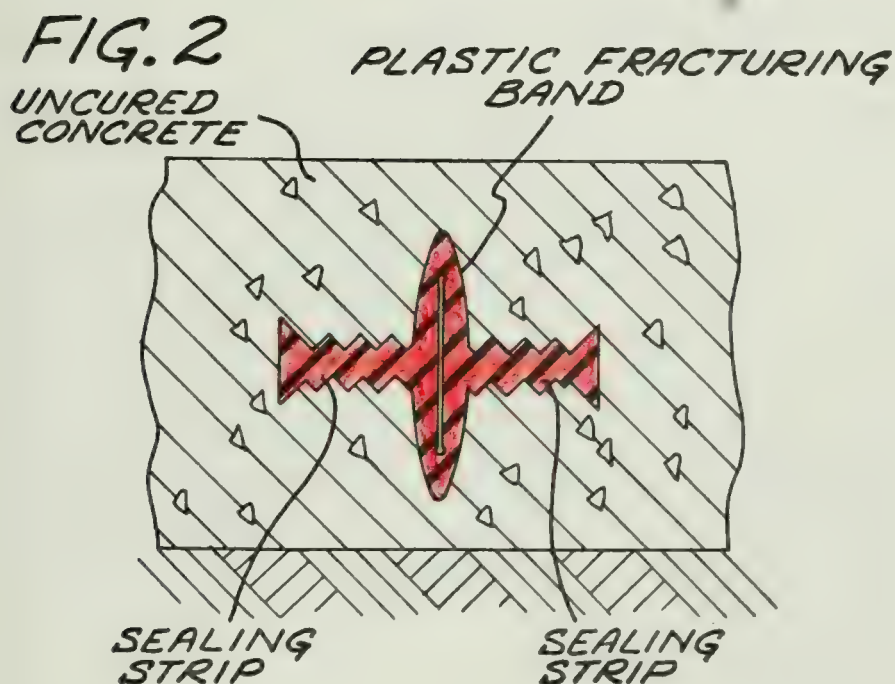
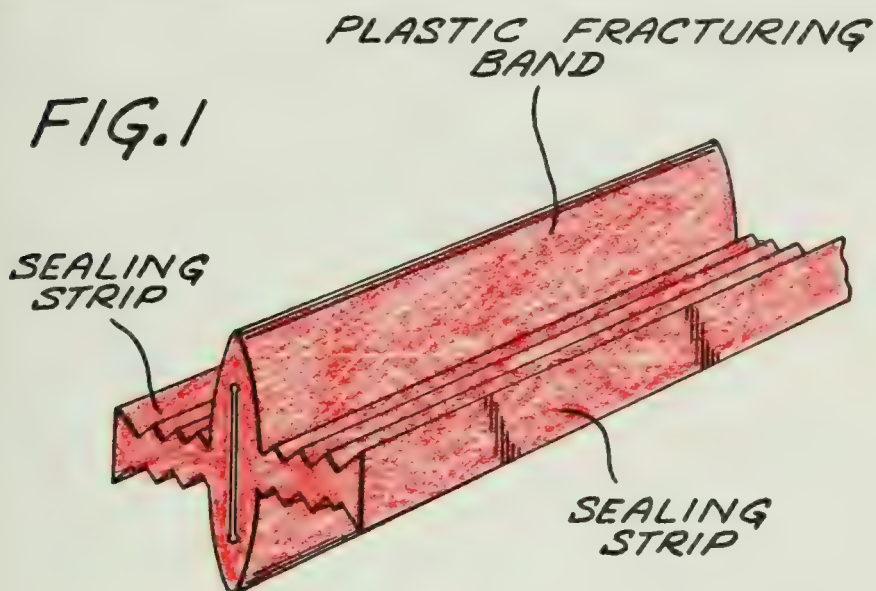


FIG. 3

CURED
CONCRETE

PLASTIC FRACTURING
BAND

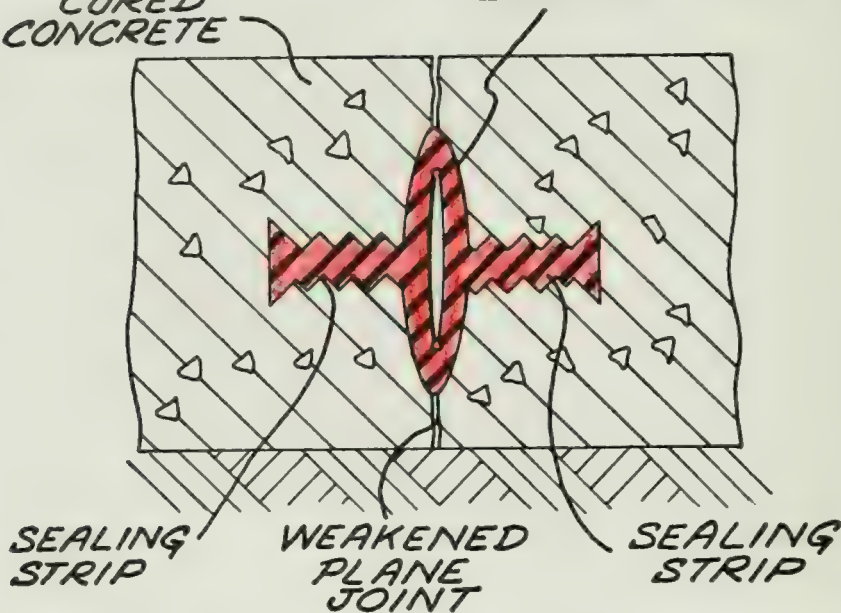
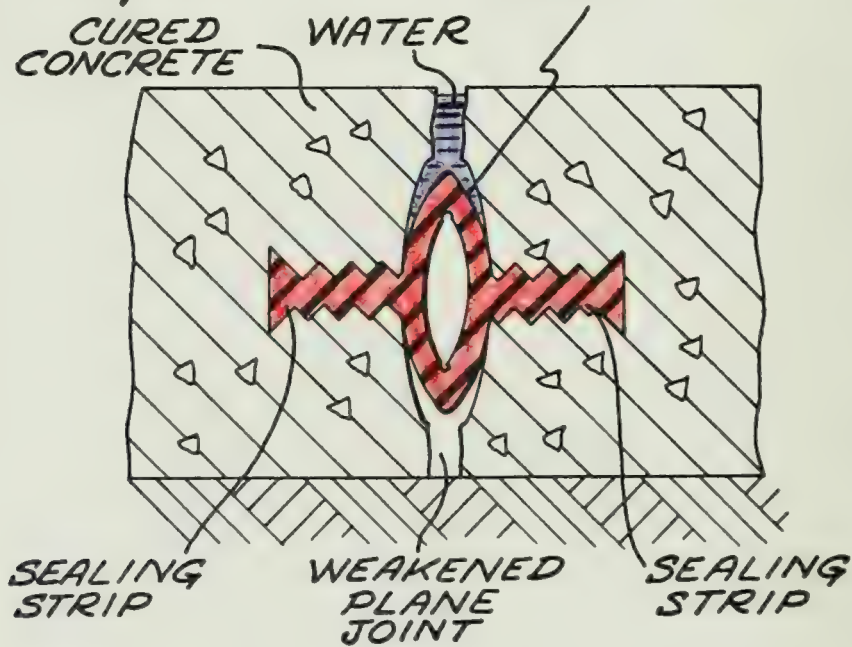


FIG. 4

CURED
CONCRETE

PLASTIC FRACTURING
BAND



Referring to the above drawings, FIG. 1 is a perspective view showing the plastic fracturing band. This band is colored red.

FIG. 2 is a side view showing the plastic band embedded in a body of concrete prior to the time the concrete has cured.

FIG. 3 shows the concrete after it has cured, with the vertical band member defining a weakened plane joint between the opposite pavement sections and the serrations of the sealing strips as being interlocked with the two pavement sections to provide a water-tight joint.

FIG. 4 indicates how the adjoining pavement sections may contract during cold weather and yet the sealing strips continue to act as a waterstop to prevent water (colored blue) from flowing downwardly through the weakened plane joint. It should also be noted that the sealing strips in conjunction with the vertical band member cooperates to lock the adjoining pavement sections against relative vertical movement.

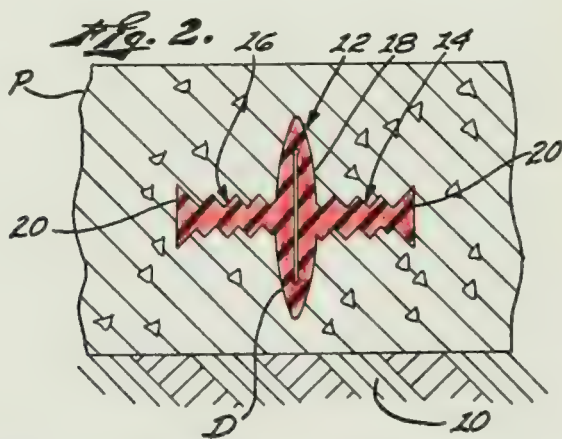
The invention proved to be an important commercial success. For example, as set forth in the Worson Affidavit (Record 251), the invention has been specified by the U. S. Bureau of Reclamation and The California Water Resources Board for use in the huge concrete canal employed on the Feather River Project, the plaintiff herein as of April 1967 having received orders for approximately 11,500,000 feet of the plastic band, while other companies to that time had received orders of approximately 7,500,000 feet. Plaintiff herein between July of 1963 and April 1967 achieved a dol-

lar volume for its plastic band of over \$2,705,000.00. This commercial success was achieved only after plaintiff expended several years and considerable money in convincing the paving trade that the invention does in fact overcome the problems of the prior art.

The commercial success of the invention, of course, has no direct bearing on the issue of infringement. It is believed, however, that this Court should be made aware that the invention is not directed to a mere "paper patent" and instead represents an important contribution to the paving art developed after long years of costly experimentation.

C. The Patent In Suit

A copy of the patent in suit is attached hereto as Appendix A. The patent discloses two forms of plastic fracturing band which may be embodied in the invention. The first form of plastic fracturing band (colored red) is shown herebelow as it appears in FIG. 2 of the patent drawings.



Referring to the above figure, the first form of plastic fracturing band includes a vertically extending

band member 12 and a pair of horizontally extending sealing strips 14 and 16 connected to each side of the band 12 at the intermediate portion thereof. The upper portion of the vertical band 12 tapers upwardly for a distance greater than the thickness of the band to provide a continuous upper straight edge while the lower portion of the vertical band tapers downwardly for a distance greater than the thickness of the band to provide a continuous lower straight edge. The band D is preferably formed of a resilient material, such as a suitable synthetic plastic. It is also preferably hollow having a central air space 18 which permits the band to be spread apart horizontally. The sealing strips 14 and 16 are provided with longitudinal serrations 19 and an anchor element 20 along each end.

Claims 1 and 2 of the patent are at issue and for the convenience of the Court these claims are reproduced herebelow:

1. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of lesser height than the depth of said paving section, said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving

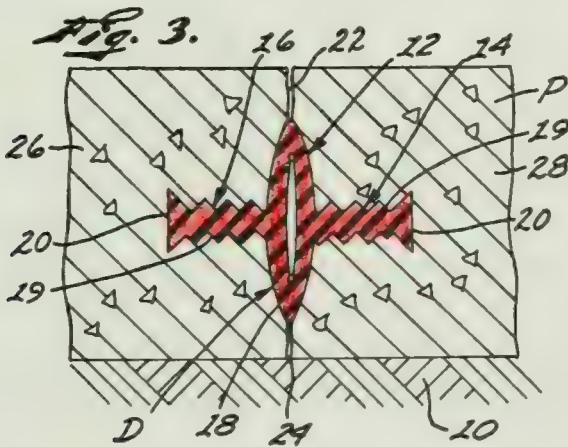
section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint.

2. In a paving section, a weakened plane joint, comprising an elongated vertically extending paving fracturing band of hollow, generally bulbular configuration, having a central air space, said band being of lesser height than the depth of said paving section, said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said

sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint.

Referring to the above claims, it should be particularly noted that such claims are not directed solely to the plastic fracturing band, but instead are directed to a paving section having a weakened plane joint formed by the vertical band member of the plastic band, with the horizontal sealing strips of the plastic band having their longitudinally extending serration means firmly embedded within the paving and such sealing strips cooperating with the paving section on either side of the weakened plane joint formed by the vertical band member to act as a waterstop. Thus, the claims are combination claims.

The combination of the patent claims is depicted in Fig. 3 of the patent which appears herebelow:



D. The Patent File History

In filing their Motion For Summary Judgment the pertinent portion of the file history relied upon by defendants as creating a file wrapper estoppel begins with the filing of Claims 13, 14 and 15 of which Claims 13 and 14 are reproduced herebelow:

“13. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of lesser height than the depth of said paving section, said band having its upper end disposed below the upper surface of said paving section and its lower end disposed above the lower surface of said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means, said paving section fracturing in vertical alignment with said band as it cures so as to define said weakened plane joint across said paving section whereafter said sealing strips cooperate with said paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, and said band and strip being formed of a resilient material whereby relative movement is permitted between portions of said paving section on either side of said weakened plane joint.

14. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of hollow, generally bulbular configuration, having a central air space, said band being of lesser height than the depth of said paving section, said band having its upper end disposed below the upper surface of said

paving section and its lower end disposed above the lower surface of said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means, said paving section fracturing in vertical alignment with said band as it cures so as to define said weakened plane joint across said paving section whereafter said sealing strips cooperate with said paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, and said band and strip being formed of a resilient material whereby relative movement is permitted between portions of said paving section on either side of said weakened plane joint.”

Claims 13, 14 and 15 were rejected as unpatentable over Heltzel 2,330,214 or Kelley 2,759,403, in view of British Patent No. 646,248. Pursuant to this rejection, the applicant canceled Claims 13, 14 and 15 and substituted therefor new Claims 16, 17 and 18. Claims 16 and 17 became Claims 1 and 2 of the patent.

New claims 16 and 17 were in fact substantially identical to canceled Claims 13 and 14 with additional language added thereto. Such language is set forth herebelow by underlining:

“16. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of lesser height than the depth of said paving section, *said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly*

for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint.

17. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of hollow, generally bulbular configuration, having a central air space, said band being of lesser height than the depth of said paving section, *said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said*

band as said paving cures so as to define said weakened plane joint across said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint."

Referring to the above claims it is critical to note that in addition to the language regarding "tapering" of the upper and lower portions of the vertical band member, there was also added: "for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section" and "for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section," together with the functional wording "whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures." This wording in its entirety was not present in the claims prior to the April 12, 1961 Amendment.

E. Defendants' Accused Structure

Defendants' accused structure is depicted in drawings presented by defendants and appearing at Page

187 of the Record. Such drawings appear immediately herebelow:

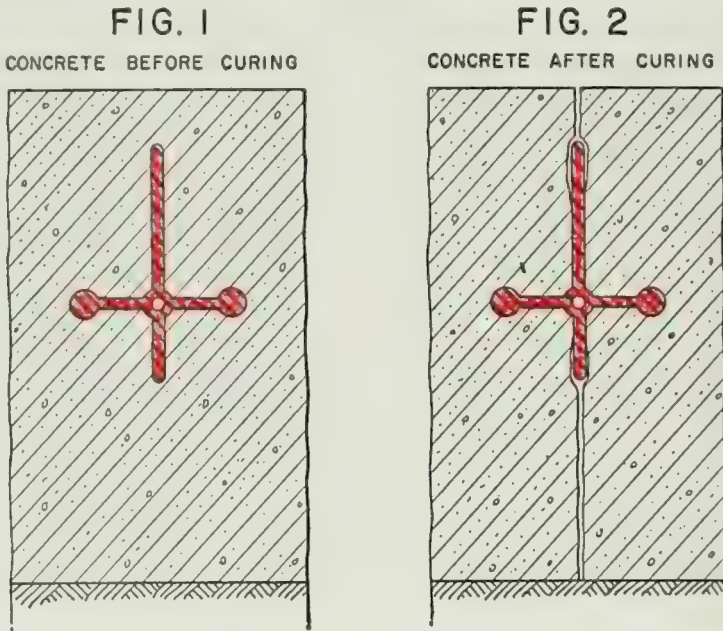


FIG. 1 of the above drawings represents a vertical cross-section of defendants' plastic fracturing band embedded in a block of concrete before the latter has cured. Defendants' plastic band (colored red) is resilient and includes a vertical band member which is generally flat-sided and is rounded at its upper and lower ends. The plastic band also includes a pair of horizontal sealing strips integral with the vertical band member. The outer ends of each sealing strip is provided with a longitudinal bead.

Referring to FIG. 2 above, as the concrete cures the vertical band member cracks a weakened plane joint through the depth of the concrete in exactly the same manner as the vertical band member of applicant's plastic fracturing band. Also, as the concrete

cures, the beads on the outer edges of the sealing strips will become embedded in the concrete whereby these strips define a waterstop at this point.

F. The Grounds For Non-Infringement Advanced By Defendants In Their Motion For Summary Judgment

Defendants' Motion for Summary Judgment, as filed, relied upon the absence of tapers in the vertical band member of defendants' plastic band as avoiding infringement. This avoidance was based upon an alleged file wrapper estoppel which assertedly precluded plaintiff from contending defendants' flat-sided vertical band member was the equivalent of the tapered vertical band member recited in patent Claims 1 and 2. Defendants filed proposed Findings of Fact Nos. 17-27 setting forth their position with respect to this ground of non-infringement (Record 222-227).

It is important to note that *none of defendants' proposed Findings of Fact filed with their Motion for Summary Judgment referred to any lack of equivalency of defendants' sealing strips and the sealing strips recited in Claims 1 and 2 of the patent in suit.*

Plaintiff filed appropriate opposition papers to defendants' Motion for Summary Judgment, including affidavits of the inventor Lee Worson (Record 246) and plaintiff's attorney Francis A. Utecht (Record 243) controverting defendants' proposed Findings of Fact Nos. 17-27 in accordance with Local Rule 4 of the Central District. Local Rule 4 appears at Appendix B.

After the hearing on the Motion for Summary Judgment, the District Court entered its MEMORANDUM

OPINION granting defendants' Motion on the issue of non-infringement only and ordered defendants to prepare appropriate Findings of Fact and Conclusions of Law. Pursuant to this Order, defendants submitted new Findings of Fact including Findings Nos. 23-26 (Record 360-363). Findings 23-26 recited the defendants' vertical band member as being non-infringing since it is straight-sided rather than tapered in view of a file wrapper estoppel precluding plaintiff from having Claims 1 and 2 construed broadly enough to read upon a flat-sided vertical band member. It should be particularly noted, however, that defendants added Findings Nos. 27-33 *which found no counterpart whatever in defendants' original proposed findings*. Findings 27-33 recited that Claims 1 and 2 of the patent in suit were additionally non-infringed because a file wrapper estoppel also precluded plaintiff from construing the longitudinally extending serration means of Claims 1 and 2 as being the equivalent of the enlarged beads along the sides of defendants' horizontal sealing strips.

Plaintiff objected to all of defendants' new Findings of Fact and Conclusions of Law and specifically pointed out the impropriety of permitting new Findings 27-33 to be introduced *after* the hearing on the Motion for Summary Judgment in view of Local Rule 4(g). The District Court, however, ignored all of plaintiff's objections and filed defendants' Findings and Conclusions.

SPECIFICATION OF ERRORS

1. The District Court erred in granting Defendants' Motion For Summary Judgment.

2. The District Court erred in finding Claims 1 and 2 of the patent in suit not infringed.

3. The District Court erred in finding there was no issue of material fact on the question of non-infringement.

4. The District Court erred in finding a file wrapper estoppel against Claims 1 and 2 of the patent in suit.

5. The District Court erred in making Findings 27-33 because such findings had no counterpart in the proposed findings filed with the Motion for Summary Judgment and this practice is directly contrary to Local Rule 4(g) of the Central District of California.

6. The District Court erred in not finding Claims 1 and 2 infringed under the Doctrine of Equivalents.

SUMMARY OF ARGUMENT

The District Court erred in making Findings 27-33 contrary to the mandate of Local Rule 4(g). By making such findings plaintiff was prejudiced since it precluded plaintiff from getting into the record facts necessary to controvert such findings on appeal.

The District Court erred in finding a file wrapper estoppel against the patent claims since the “tapering” limitations added to these claims could by no stretch of the imagination be held directed to the “heart of the invention”.

The District Court erred in not finding the patent claims infringed under the doctrine of equivalents since it was uncontroverted that defendants’ structure performs substantially the same function as the patented

combination in substantially the same way to obtain the same result.

The District Court erred in finding there was no issue of material fact on the question of non-infringement. The Utech Affidavit raised a genuine issue of material fact as to the reason the “tapering” language was added to the patent claims. The District Court resolved any doubts presented by this affidavit in favor of defendants rather than plaintiff contrary to the well-established law in this circuit that all doubts should be resolved against the party bringing a Motion for Summary Judgment.

ARGUMENT

I. The District Court's Non-Compliance With Local Rule 4 Was Per Se Grounds For Reversal

Referring to Local Rule 4(g) set forth at Appendix B, it is mandatory for the movant in a Motion for Summary Judgment to serve and lodge proposed Findings of Fact stating the material facts as to which the moving party contends there is no genuine issue. The opposing party then has an opportunity to file a statement of genuine issues necessary to be litigated and affidavits controverting the proposed findings of fact presented by the moving party. As pointed out hereinbefore in the statement of the case, prior to the hearing on defendants' Motion for Summary Judgment defendants had not lodged any counterparts for Findings 27-33 submitted after such hearing. Accordingly, plaintiff had no opportunity to file a statement of genuine issues

setting forth which of the new facts of paragraph 27-33 plaintiff contended there existed a genuine issue. Similarly, plaintiff had no opportunity to controvert the facts of paragraph 27-33 by affidavits. *This action of the District Court was prejudicial to plaintiff since it precluded plaintiff from getting into the record facts necessary to controvert such findings on appeal.* Plaintiff was therefore deprived of its day in this Court.

2. The District Court Erred In Finding A File Wrapper Estoppel Against Claims 1 And 2 Of The Patent In Suit.

In this case the District Court found a file wrapper estoppel precluding plaintiff from asserting that defendants' straight-sided vertical band falls within the scope of patent Claims 1 and 2, such claims reciting the vertical band as being tapered. This ground of file wrapper estoppel, however, would not be proper unless the "tapering" language goes to the heart of the invention. This "heart of the invention" doctrine is well-established law in the Ninth Circuit as indicated from the following language in *International Manufacturing Co. v. Landon*, 336 F.2d 723 (August 1964) wherein the Court stated:

"The gravamen of file wrapper estoppel, as this Court recently said in *M.O.S. Corp. v. John I. Haas Co.*, 9 Cir., 332 F.2d 910, 141 USPQ 767, is that an applicant who acquiesces in the rejection of his claim, and accordingly modifies it to secure its allowance, will not subsequently be allowed to expand his claim by interpretation to include the *principles* originally rejected, or their equivalents.

As indicated by the statement made by the

examiner at the time, claim 10 was not rejected because of an overly-broad definition of filter elements, or because it permitted use of a sock-type filter. It was rejected for the reason that claim 10, read as a whole, was unpatentable over other named patents. *The disc-like filter element could not be the heart of the Pace invention since it, as well as the sock-type filter element, is old in the art. What was new, and what was patented, was the combination of parts in which a filter unit is correlated to the remaining elements so that the combination performs the desired skimming and filtering functions.*" (*Emphasis Added.*)

Because the *International Manufacturing Co.* case is on all fours with the present case, a brief examination of the facts in *International* is believed necessary. In *International* the patented combination was a water recirculation system for use in swimming pools and included a filter, a filter housing, a water passage, a screen, a buoyant weir and a pump. The questioned patent claim originally recited the filter in broad terms. During the patent prosecution the definition of the filter was narrowed to recite such filter as being disc-like. The infringer's device utilized a sock-type filter. It was the infringer's contention that since the patent claim originally recited the filter in broad terms and was later narrowed to recite the filter as being disc-like, a file wrapper estoppel existed against construing the claim broadly enough to read upon the infringer's sock-type filter.

As indicated by the language set forth hereinabove, this Court rejected such contention on the basis that the

disc-like filter could not be the heart of the invention since it was old in the art and that what was new and what was patented was the combination of parts in which a filter unit of any type is correlated to the other elements of the combination so that the combination performs the desired function.

From the above review of the facts in the *International* case it will be seen that the present case is exactly apposite. In the present case, the patent claims did not initially recite the vertical band as being tapered. During the prosecution of the application, however, the tapering of the vertical band was added to the claims. Such tapering, however, could not possibly be considered the heart of the invention and was old in the art, as represented for example by Wey Patent No. 2,901,904, a copy of which appears as Exhibit D to the Book of Patents filed in support of Defendants' Motion for Summary Judgment and Jacobson Patent No. 2,025,209 (Exhibit M of said Book). *What was new and what was patented by Worson was the combination of a length of paving in which the fracturing band was correlated with the paving so that the fracturing band not only formed the weakened plane joint but also served as a waterstop in the completed joint.* Accordingly, the District Court was clearly in error in finding a file wrapper estoppel which precluded plaintiff from construing Claims 1 and 2 broadly enough to read on defendants' straight-sided vertical band.

The District Court also found a file wrapper estoppel precluding plaintiff from construing the "longitudinally extending serration means" of patent Claims 1 and 2

broadly enough to include the enlarged beads formed along the edges of defendants' horizontal sealing strips. As noted hereinbefore, plaintiff had no opportunity to controvert the facts set forth in Findings 27-33 by affidavit. Plaintiff, however, can find no language in the patent file history indicating that the patentee narrowed his description of the means on the sealing strips that interlock with the concrete to form a water seal therebetween because of the prior art. Instead, it would appear that the term finally employed in the claims, i.e. "longitudinal serration means", is broader than the language employed in the specification. Moreover, the serration means per se could hardly be considered the heart of the Worson invention since they are old in the prior art, as represented for example in FIG. 2 of British Patent No. 646,268 (Exhibit L in the Book of Patents) filed with the Motion for Summary Judgment.

3. The District Court Erred In Finding Claims 1 and 2 Of The Patent In Suit Not Infringed.

Admittedly patent Claims 1 and 2 are not literally infringed by defendants' structure. This follows since defendants' vertical band is straight-sided rather than being tapered, and defendant employs elongated beads on the edges of the horizontal sealing strips, rather than the serration means recited in the claims. Plaintiff contends, however, that the doctrine of equivalents applies in this case whereby defendants' structure clearly infringes.

This Court has carefully defined the doctrine of equivalents in *Nelson v. Batson*, 322 F.2d 132 (August 1963):

“To these requirements the doctrine of equivalents is a court-created exception - ‘an anomaly,’ logically inconsistent with the provisions of the statute and the public policy they reflect (*Royal Typewriter Co. v. Remington Rand, Inc.*, 168 F.2d 691, 692, 77 USPQ 517, 518 (2d Cir. 1948), but nonetheless necessary to avoid rendering the patent ‘a hollow and useless thing,’ by permitting the unscrupulous copyist to make unimportant and insubstantial changes and substitutions in the patent which, though adding nothing, would be enough to take the copied matter outside the claim.’ *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.* 339 U.S. 605, 607, 85 USPQ 328, 330 (1950).

“The doctrine of equivalents is directed against those who seek to pirate a patented device with impunity by introducing ‘minor variations to conceal and shelter the piracy.’ 339 U.S. at 607, 85 USPQ at 330. ‘The essence of the doctrine is that one may not practice a fraud on a patent.’ By its terms, a patentee may treat as an infringer one who produces a device which, though not within the literal language of the claims of the patent, ‘performs substantially the same function in substantially the same way to obtain the same result’ as the claimed device, for the two devices are then in reality the same, differing only ‘in name, form or shape.’ 339 U.S. at 608, 85 USPQ at 330.”

Referring particularly to the language appearing in the last paragraph quoted above, defendants’ structure is not within the literal language of the patent claims, however, defendants’ structure performs substantially the same function in substantially the same way to obtain the same result. This equivalency was firmly

established by Paragraphs 12, 13 and 14 of the Worson Affidavit and Paragraph 7 of the Utecht Affidavit. These paragraphs are reproduced herebelow :

Worson Affidavit

“12. I am familiar with the paving sections formed by the defendant Peter Kiewit and shown at Exhibit C of defendants’ MOTION FOR SUMMARY JUDGMENT. This joint employs each of the elements or their equivalents recited in Claims 1 and 2 of my patent. Specifically, such paving section includes a weakened plane joint formed by the upper and lower portion of a resilient band and with such band having horizontally extending sealing strips formed with longitudinally extending projections which are firmly embedded within the paving as the paving cures, such sealing strips cooperating with the paving section on either side of the weakened plane joint to restrain the downward flow of water through the joint. Because the band is of resilient material, relative movement is permitted between the portions of the paving section on either side of the weakened plane joint. The upper and lower portions of the fracturing band provide a continuous straight edge disposed above the lower surface of the paving section and below the upper surface of the paving section whereby the paving section undergoes fracturing and vertical alignment with the upper and lower edges of the band as the paving cures so as to form the weakened plane joint.

13. It is immaterial to the results produced by embedding the band in the paving joint formed by the defendant Kiewit that there is not a uniform taper of the sides of the upper and lower

portions of the fracturing band, since the upper and lower edges of the defendants' fracturing band define straight edges relative to the paving section. Also, it is immaterial that on defendants' band the outer ends of the horizontal strips are formed with generally cylindrical protrusions rather than the serrations employed in my strips, since these protrusions become embedded within the paving as the paving cures whereby the horizontal strips act as waterstops exactly as the horizontal strips in my band act as waterstops.

14. As further proof of the equivalency of the Kiewit paving section and my patented paving section, the U. S. Bureau of Reclamation lists the Goodrich plastic waterstop used in the Kiewit paving section as the equivalent of the CONSTOP waterstop of Edoco Technical Products, Inc. This fact is established by the ADDENDUM NO. 1 issued by the U. S. Bureau of Reclamation, attached hereto as Exhibit D."

Utecht Affidavit

"7. That it is immaterial and inconsequential whether or not such straight edges are defined by having the sides of the upper and lower portions of the band tapering uniformly upwardly and downwardly, or by having the upper and lower portions of the band formed by an abruptly tapered configuration adjacent the center of the band, flat vertically extending surfaces outwardly of said center and rapidly vertically tapering top and bottom edges, as in the case of defendants' strip shown in Exhibit C of the MOTION FOR SUMMARY JUDGMENT."

It will be clearly apparent from the above-quoted language that the defendants' structure "performs sub-

stantially the same function in substantially the same way to obtain the same result” as the structure of patent Claims 1 and 2. Defendants’ structure and the patented structure “are then in reality the same, differing only in name, form or shape”. Thus, according to the doctrine of equivalents as expressed by this Court in *Nelson v. Batson* (Supra), defendants’ structure clearly infringes.

It should be particularly noted that the equivalency of defendants’ structure with the patent claims has never been denied by defendants, in fact, such denial would have raised a question of fact which would have precluded the propriety of the Motion for Summary Judgment. Accordingly, this equivalency must be assumed as true for the purpose of the Motion. Therefore, how can there be any doubt but that the doctrine of equivalents should have been applied in this case so as to preclude the finding that Claims 1 and 2 are not infringed?

4. The District Court Erred In Finding There Was No Issue Of Material Fact On The Question Of Non-Infringement.

It is well established in this Circuit that a Motion for Summary Judgment should not be granted where there exists even a single genuine issue of fact and that all doubts must be resolved against the moving party. This doctrine has been followed in many Ninth Circuit of Appeals decisions including *Sequoia Union High School District v. United States*, 245 F.2d 227, *Neff Instrument Corp. v. Cohu Electronics*, 269 F.2d 668 and *Griffith v. Utah Power*, 226 F.2d 66.

The following language of this Court from *Cee-Bee Chemical v. Delco*, 263 F.2d 150 in reversing a motion for summary judgment in a patent action is particularly in point:

“If the conclusions reached by the trial court required it to first resolve a genuine issue as to a material fact, the case should not have been disposed of on a motion for summary judgment.”

It is plaintiff's position that the issue of infringement in this case requires a determination of fact and therefore could not have properly disposed of by the Motion for Summary Judgment. Traditionally, a Motion For Summary Judgment will not be granted on the basis of non-infringement. A case which is exactly in point is *Yardley Created Products Co. v. Clopay Corp.* decided by the 7th Circuit Court of Appeals in November 1963 and reported at 324 F.2d 932. In the *Yardley* case the Court of Appeals reversed a motion for summary judgment of non-infringement. The motion was granted on the basis that a file wrapper estoppel existed so as to preclude the plaintiff from relying on the doctrine of equivalents. This Court's attention is respectfully directed to the following pertinent language from the *Yardley* decision:

“Plaintiff agrees that, as suggested by Clopay, summary judgment is infrequently granted in patent actions. But plaintiff argues that the simplicity of the devices here involved renders expert opinion testimony of little value; that the Court has before it the prosecution history of the patent and the litigation on which the reissue was based.

“As appellant points out, neither party, nor

the Court, has found a reported Court of Appeals case in which summary judgment has been affirmed when awarded for non-infringement unless there was a clear omission of one or more elements, a substantially different mode of operation, or a clearly shown file wrapper estoppel. Both *Steigleder v. Eberhard Faber Pencil Co.*, 1 Cir., 1949, 176 F.2d 604, 82 USPQ 323, cert. den. 338 U.S. 893, 83 USPQ 544, (cited by plaintiff) and *Vulcan Corp. v. International Shoe Machine Corp.*, District Court, Mass., 1946 68 F.Supp. 990, 60 USPQ 257, *afid.* Per Curiam, 1 Cir., 1946, 158 F.2d 520, 71 USPQ 310, cert. den. 1947, 330 U.S. 825, 72 USPQ 529, cited in *Steigleder*, fall within that class.

“Yardley does contend, as indicated, that we do have a case of file wrapper estoppel before us. But the issue of file wrapper estoppel presents factual questions.”

Plaintiff herein opposed defendants' Motion for Summary Judgment on the basis that the issue of file wrapper estoppel presented unresolved factual questions. Specifically, PLAINTIFF'S STATEMENT OF GENUINE ISSUES filed in accordance with Local Rule 4(g) included the following:

“12. Whether or not the tapers recited in Claims 1 and 2 constitute the point of novelty of the patented combination.

13. Whether or not the tapers recited in Claims 1 and 2 constitute express and material limitations.

14. Whether or not the tapers added in Claims 1 and 2 gave rise to a file wrapper estoppel.”

In further compliance with Local Rule 4(g) plaintiff

filed the Utecht Affidavit controverting defendants' contention that the "tapering" language added to the patent claims constituted the point of novelty of the invention and that such tapers constitute express and material limitations so as to give rise to a file wrapper estoppel. Paragraphs 2-6 of the Utecht Affidavit appear herebelow:

Utecht Affidavit

"2. That I prepared and prosecuted Worson Patent No. 3,023,681, such patent being the subject of the above-entitled suit.

3. That I have carefully reviewed defendants' MOTION FOR SUMMARY JUDGMENT and accompanying papers filed in the above-entitled action and noted the contention therein that the language added to Claims 1 and 2 of Patent No. 3,023,681 reciting the upper and lower bands as tapering constitutes the point of novelty of the claimed combination (Page 29). Further, that the tapers recited in these claims constitute express and material limitations (Page 31).

4. That, in fact, the tapers recited in said patent claims were immaterial limitations and were introduced into the claims *together with* the words "for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section" and "for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section," together with the functional wording "whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures."

This wording in its entirety was not present in the claims prior to the amendment dated April 12, 1961. The primary purpose of such wording was to distinguish patentably over Fig. 2 of British Patent No. 646,248, as evidenced by the Remarks accompanying said amendment.

5. That such remarks point out said British Patent No. 646,248 discloses a tubular member 5 disposed at the junction of two separately-joined paving sections 2 and 3. The above-quoted words differentiated from the British patent in that the tubular central portion 5 of the British patent is not intended to nor could it possibly serve as a fracturing band. This is true because its vertical dimensions relative to the depth of the concrete slab are not of sufficient height. The vertical dimension of the tubular part 5 is but slightly greater than the vertical dimensions of the serrated strip 7 relative to the width of the band. Hence, should the British device be embedded in an uncured pavement slab, upon hardening of the pavement the device would not in my opinion effect any vertical fracturing in the manner of the patented device.

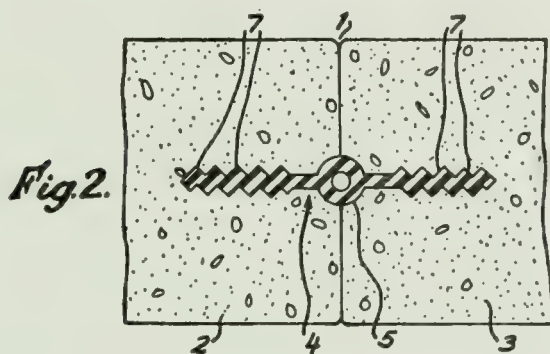
6. That the reference to tapering added to said patent claims was primarily for the purpose of describing the upper and lower edges of applicant's fracturing band as being "straight edges," since it is essential to have a continuous straight edge at the upper and lower ends of the bands in order to effect fracturing.

Referring to the above language, it will be noted that Utecht prepared and prosecuted the patent in suit. Accordingly, *he had first-hand knowledge as to why the "tapering" limitations were introduced*

into the patent claims. According to the Utecht Affidavit the “tapering” language was introduced into the claims together with additional functional language reciting how the vertical band fractured the pavement as the latter cured. The primary purpose of adding such wording to the claims was to distinguish patentably over FIG. 2 of British Patent No. 646,248, as evidenced by the remarks accompanying the amendment which changed the claims.

For the convenience of this Court there appears below FIG. 2 of the British patent and the subject remarks set forth in the amendment which changed the claims:

British Patent No. 646,268



— Remarks —

April 14, 1961 — Amendment

“The courtesy of the Examiner at the recent interview is hereby acknowledged.

At this interview, the desirability of revising the form of the claims so as to patentably distinguish over the prior art was discussed. In accordance with this discussion, claims 13, 14 and 15

have been cancelled and new claims 16, 17 and 18 substituted therefore.

The new claims specifically recite the applicant's paving fracturing band as having an upper portion tapering upwardly for a distance greater than the thickness of the band to provide a continuous straight edge below the upper surface of the paving section. Similarly, the lower portion of the band is recited as tapering downwardly for a distance greater than the thickness of the band to provide a continuous straight edge disposed above the lower surface of the paving section. Because of this configuration, the paving section undergoes fracturing in vertical alignment with the upper and lower edges of the band as the paving cures so as to define a weakened plane joint across the paving section.

This specific description of the applicant's paving fracturing band is believed to clearly distinguish over Fig. 2 of the British patent. In this regard, the British patent discloses a tubular member 5 disposed at the juncture of two separately joined paving sections 2 and 3.

The new claims also recite the applicant's integral horizontally extending sealing strips 14 and 16 as being formed with longitudinally extending serration means that are firmly embedded within the paving as the latter cures. This arrangement insures that the sealing strips will restrain the downward flow of water through the joint while relative movement is permitted by the paving sections on either side of the weakened plane joint."

From the above it will be apparent that the Utech Affidavit presented a genuine issue of fact as to the reason the "tapering" language was added to the patent claims. If the "tapering" language was added solely

to overcome the prior art rejection a file wrapper estoppel would result. If, however, such language was added in conjunction with the other functional language to better distinguish the principle of operation of the entire combination over the British patent (as contended by the affidavit) a file wrapper estoppel would not have arisen. It is important to note that the Remarks accompanying the amendment which changed the claims do not state the “tapering” is essential to the function of the fracturing band. It should further be noted that the first paragraph of such remarks refer to “the desirability of revising the *form* of the claims” as opposed to changing the *substance* of the claims.

If the District Court had given credence to the Utecht Affidavit it could not possibly have found a file wrapper estoppel. Instead the District Court chose to ignore the Utecht Affidavit and resolved the issue of fact presented thereby solely upon the Court’s interpretation of the language of the file history, as evidenced by Finding 34 which appears immediately herebelow:

“34. Insofar as the affidavits of Francis A. Utecht and Lee Worson filed in opposition to defendant’s Motion for Summary Judgment, may appear to conflict with any of the foregoing findings dealing with the file wrapper history, and non-infringement, such affidavits cannot be used to contradict the contents of the file history nor to change the patentee’s position taken therein and therefore present no genuine issues of material facts.”

This action on the part of the District Court raises the question on this appeal as to whether it is proper for

a District Court to completely ignore the sworn affidavit of the patent attorney prosecuting a patent as to the attorney's reasons for amending the claims of such application and substitute for the attorney's reasons the Courts interpretation of such reasons. *This action by the District Court constituted the resolution of a disputed material issue of fact making the granting of the Motion For Summary Judgment improper.*

Of course it might have been proper for the District Court to ignore the Utecht Affidavit if the Worson file history completely contradicted such Affidavit. In the present case however, the remarks quoted hereinabove appearing in the Amendment making the claim changes are in complete accord with the attorney's position. The same is true with respect to the disclosure of the British Patent No. 646,248, such British patent showing a tapered vertical band, but with such band not being of sufficient height relative to the depth of the concrete slab to effect fracturing.

The correlation between the language of the file history and the Utecht Affidavit regarding the reason for adding the tapering language to the claims should have at least raised a doubt as to the propriety of completely discounting the Utecht Affidavit. Since the law is clear that all doubts must be resolved against the moving party, any doubt the District Court had regarding such issue of fact, should have been resolved in plaintiff's favor rather than in favor of the defendants when ruling on defendants' Motion For Summary Judgment.

CONCLUSION

The District Court erred in granting defendants' Motion For Summary Judgment holding the patent in suit invalid.

The District Court's holding should be reversed and the matter remanded to the District Court for trial.

Respectfully submitted,
FULWIDER, PATTON,
RIEBER, LEE & UTECHT

By Francis A. Utecht
Attorneys for Plaintiff-Appellant
Edoco Technical Products, Inc.

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

Francis A. Utecht

APPENDIX A

March 6, 1962

L. WORSON

3,023,681

COMBINED WEAKENED PLANE JOINT FORMER AND WATERSTOP

Filed April 21, 1958

Fig. 1.

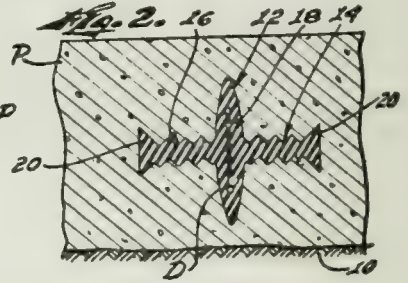
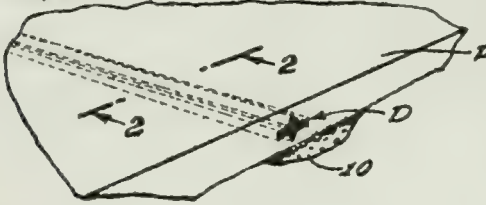


Fig. 3.

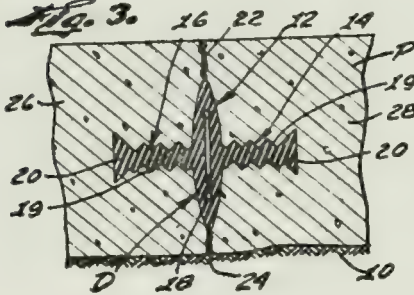


Fig. 4.

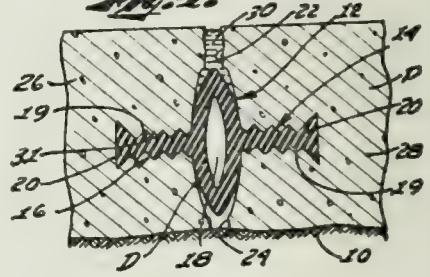


Fig. 5.

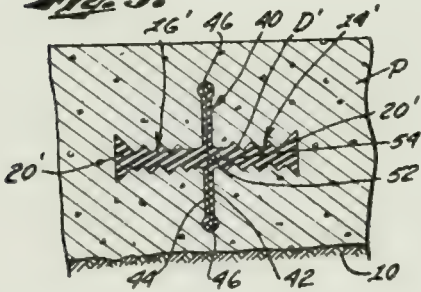


Fig. 6.

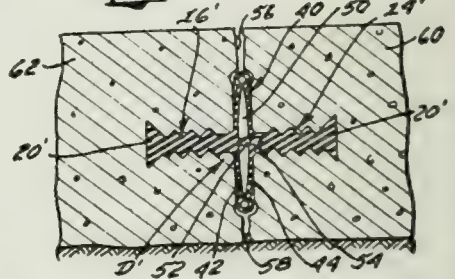
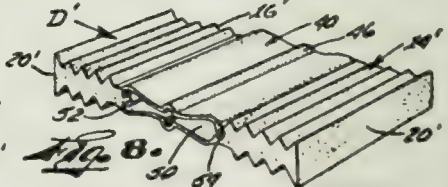
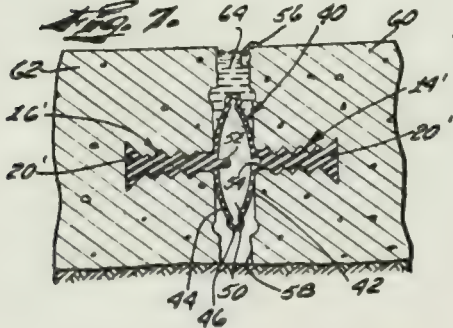


Fig. 7.



INVENTOR
LEE WORSON
BY FULWIDER, MATTINGLY
& HUNTLEY
ATTORNEYS

United States Patent Office

3,023,681

Patented Mar. 6, 1962

1

3,023,681

COMBINED WEAKENED PLANE JOINT
FORMER AND WATERSTOP

ee Worson, Long Beach, Calif., assignor to Edoce Technical Products, Inc., Long Beach, Calif., a corporation of California

Filed Apr. 21, 1958, Ser. No. 729,743

3 Claims. (Cl. 94—18)

The present invention relates generally to the field of construction and more particularly to the forming and sealing of weakened plane joints in a paved surface.

In the construction of paved roads, airport runways and the like, it is common to tamp transversely extending separator strips at longitudinally spaced points in the uncured paving material. These separator strips serve to define weakened plane joints in the paving material, contraction of the paving material as it cures and hardens causing it to crack at each of the weakened plane joints.

Such weakened plane joints are not provided the pavement would be damaged by the uncontrolled cracking which would otherwise occur during its contraction. In addition to the use of such separator strips for forming weakened plane joints, it has been heretofore proposed to saw vertical slots in the paving material prior to the time it undergoes final contraction. During final contraction, the paving material below the saw cut will fracture so as to form the weakened plane joint.

After a weakened plane joint has been formed, it is necessary by a separate operation to force a sealing compound downwardly thereinto. Such sealing compound restrains the downward flow of water through the weakened plane joint. Unless such downward flow is prevented, water will accumulate beneath the pavement slabs on either side of the joint and as the slabs undergo vertical movement due to the weight of the vehicles passing thereover, the water will gradually wash out the road bed. Additionally, in colder climates the water will freeze with consequent damage to the paving material.

It is a major object of the present invention to provide a combined weakened plane joint former and waterstop device which may be substituted for the heretofore-proposed arrangements of forming and sealing weakened plane joints.

Another object is to provide a device of the aforescribed nature which is more economical in use than the heretofore-proposed weakened plane joint forming and sealing arrangements.

A more particular object is to provide a device of the aforescribed nature which includes an elongated, vertically extending band and a horizontally extending sealing strip connected to each side of the band, which device is adapted to be embedded in an uncured paving section and extending thereacross, the pavement fracturing in vertical alignment with the band as it cures so as to define a weakened plane joint, whereafter the two sealing strips cooperate with the paving material slabs on either side of the joint to restrain the downward flow of water through the joint.

It is yet a further object of the present invention to provide a combined weakened plane joint former and waterstop device of the aforescribed nature which will effectively seal the joint even where the slabs on either side thereof undergo extensive movement in opposite directions.

Another object of the present invention is to provide a combined weakened plane joint former and waterstop device of the aforescribed nature which may be economically packaged for shipping, storing and handling.

An additional object is to provide a novel waterstop device incorporating a unique sealing strip.

These and other objects and advantages of the present

2

invention will become apparent from the following detailed description, when taken in conjunction with the appended drawings wherein:

FIGURE 1 is a perspective view showing a combined weakened plane joint former and waterstop device embodying the present invention embedded in an uncured paving section;

FIGURE 2 is an enlarged vertical sectional view taken on line 2—2 of FIGURE 1;

FIGURE 3 is a second view taken along line 2—2 but showing the manner whereby said device forms a weakened plane joint across said paving section;

FIGURE 4 is a view similar to FIGURE 3 showing how said device functions as a waterstop;

FIGURE 5 is a vertical sectional view showing a second form of combined weakened plane joint former and waterstop device embodying the present invention embedded in an uncured paving section;

FIGURE 6 is a view similar to FIGURE 5 showing the manner said device forms a weakened plane joint across said paving section;

FIGURE 7 is another view similar to FIGURE 5 showing how said device will continue to act as a waterstop even after considerable relative movement of the slabs on either side of the joint in opposite directions; and

FIGURE 8 is an enlarged perspective view showing how said second form of device may be collapsed for shipping, storing and handling.

Referring to the drawings, the first form of combined weakened plane joint former and waterstop device D embodying the present invention is shown embedded in an uncured paving section P. The device D is of elongated configuration and in practice it may be retained in its position of FIGURE 1 by suitable means (not shown) as the paving material is poured around it. The paving section P rests upon a roadbed or other generally horizontal base 10.

Referring now to FIGURE 2, the combined weakened plane joint former and waterstop device D includes an elongated, vertically extending band member, generally designated 12, and a pair of horizontally extending sealing strips, generally designated 14 and 16, that are connected to each side of the band 12. The upper portion of band 12 tapers upwardly for a distance greater than the thickness of the band to provide a continuous upper straight edge while the lower portion of the band tapers downwardly for a distance greater than the thickness of the band to provide a continuous straight edge at the lower end of the band. Preferably, the device D is formed of a resilient material, as for example a suitable synthetic plastic such as polyvinyl chloride. The band 12 is preferably of hollow, generally bulbular configuration having a central air space 18. The strips 14 and 16 are identical and are integral with the band 12. Preferably, these strips 14 and 16 are serrated to define longitudinal ribs 19 and are formed at their free ends with an enlarged anchor element 20. These anchor elements 20 become firmly embedded within the paving material when the latter cures.

Referring now to FIGURE 3, at such time as the paving material of section P cures and thus undergoes contraction, this paving material will fracture in vertical alignment with the band so as to form upper and lower slots indicated at 22 and 24, respectively. In this manner, the device D serves to form a weakened plane joint interposed between two adjoining slabs 26 and 28 created thereby in the paving section P.

Referring now to FIGURE 4, at such times as the slabs 26 and 28 undergo relative movement away from one another, the aforescribed device D will serve as an effective waterstop. In this regard, the water 30 entering the slot 22 above the band 12 will not be able to

3,028,681

3

flow downwardly past the sealing strips 14 and 16 inasmuch as the ribs 19 thereof will cooperate with the ridges 31 formed in the paving material wherein they are embedded to prevent any percolation of such water outwardly along the sealing strips. It should be particularly observed that the greater the relative separation between the slabs 26 and 28, the tighter the seal between the sealing strips 14 and 16 and the paving material wherein they are embedded. This is true because the ribs 19 of these sealing strips will be pulled into tight engagement with the pointed ridges 34 of the paving material. It should also be observed that the provision of the enlarged anchor elements 20 of the sealing strips 14 and 16 reduce the possibility that these strips will become loosened from the paving material P during relative movement between the slabs 26 and 28. As clearly indicated in this figure, the band 12 will under go horizontal expansion normal to its longitudinal axis as the slabs 26 and 28 move away from one another.

Referring now to FIGURES 5 and 8, there is shown a second form of combined weakened plane joint former and water stop device D' embodying the present invention. This second form of device D' is generally similar to the first form D, except for the shape of its band member, generally designated 40. The sealing strips 14' and 16', however, may be identical with their counterparts 14 and 16 of the first form of device D, as will be apparent from the drawings.

The band member 40 of the second form of device D' includes a pair of generally vertically extending, flexible side walls 42 and 44 which are integrally joined along their upper and lower ends by a semi-circular closure bead 41. The side walls 42 and 44 define a central air space 50. The aforementioned sealing strips 14' and 16' are integrally connected to the midportion of the side walls 42 and 44. The midportion of one of the side walls 44 is formed with a male button member 52 that extends towards the opposite side wall 42. This button member 52 is adapted to be received by a complementary female socket 54 centrally formed along the side wall 52 and partially extending into the sealing strip 14'. The button member 52 and the socket 54 cooperate to form readily disengageable fastener means between the side walls 42 and 44.

Referring now to FIGURE 6, at such time as the paving material of section P cures and thus undergoes contraction, this paving material will fracture in vertical alignment with the band 14 so as to form upper and lower slots 56 and 58. In this manner the device D' serves to form a weakened plane joint interposed between two adjoining slabs 60 and 62. During such contraction of the paving material, the button member 52 may become withdrawn from the socket 54.

Referring now to FIGURE 7, at such time as the slabs 60 and 62 undergo relative movement away from one another, the device D' will serve as an effective waterstop to prevent any water 64 entering the upper slot 56 from flowing downwardly past the sealing strips 14' and 16' in the manner described hereinabove with regard to the first form of device D. It should be particularly noted that during any extensive relative movement of the slabs 60 and 62 in opposite directions, the button member 52 will be pulled from the slot 54. The flexibility of the sidewalls 42 and 44 permits even extensive relative movement of the slabs 60 and 62 in opposite directions to take place without damage to the device D'. This is particularly advantageous where the slabs 60 and 62 undergo unplanned movement in opposite directions relative to one another.

Referring now to FIGURE 8, it is a particular feature of the second form of device D' that the band 40 may be collapsed to a substantially horizontally extending configuration at such time as the button member 52 is withdrawn from the socket 54. This permits the device D' to be formed into a roll as shown in this figure

4

so as to facilitate its shipping, storing and handling. When the device D' is to be employed at the job site, the proper length is cut from the roll and thereafter the button member 52 is inserted within the socket 54.

It will be apparent from the foregoing description that a combined weakened plane joint former and waterstop device constructed in accordance with the present invention will afford many advantages over the heretofore proposed arrangements for forming and sealing weakened plane joints. It will also be apparent that various modifications and changes may be made with regard to the foregoing detailed description without departing from the spirit of the invention or the scope of the following claims.

I claim:

1. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of lesser height than the depth of said paving section, said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint.

2. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of hollow, generally bulbular configuration, having a central air space, said band being of lesser height than the depth of said paving section, said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint.

3. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of lesser height than the depth of said paving section, said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed

3,023,661

5

above the lower surface of said paving section whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving section, said fracturing band being defined by a pair of side walls joined along their upper and lower edges so as to define a hollow air space therebetween, with readily disengagable fastener means being interposed between said side walls; and a horizontally extending sealing strip integrally connected to each side of said band, said strips each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures, said sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material

8

10

15

6

whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint.

References Cited in the file of this patent

UNITED STATES PATENTS

2,025,209	Jacobson	Dec. 24, 1935
2,330,214	Heltzel	Sept. 28, 1943
2,508,443	Carter	May 23, 1950
2,540,251	Fischer	Feb. 6, 1951
2,619,884	Jacobson	Dec. 2, 1952
2,759,403	Kelley	Aug. 21, 1956

FOREIGN PATENTS

646,268	Great Britain	Nov. 15, 1950
---------	---------------	---------------

APPENDIX B

Local Rule 4(g)

U.S. District Court, Central District of California
“4(g). Motions for Summary Judgment

“(1) There shall be served and lodged with each motion for summary judgment pursuant to Rule 56 of the F.R. Civ. P. proposed findings of fact and conclusions of law and proposed summary judgment. Such proposed findings shall state the material facts as to which the moving party contends there is no genuine issue.

“(2) Any party who opposes the motion shall, not later than five (5) days after service of the notice of motion upon him, serve and file a concise “statement of genuine issues” setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

“(3) In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are controverted by affidavit filed in opposition to the motion.”

No. 22208

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDOCO TECHNICAL PRODUCTS, INC.,

Appellant,

vs.

PETER KIEWIT SONS' CO., and THE B. F. GOODRICH
COMPANY,

Appellees.

APPELLEES' BRIEF

and

APPENDIX CONTAINING PORTIONS
OF RECORD ON APPEAL.

HUEBNER & WORREL,
HERBERT A. HUEBNER,
HARLAN P. HUEBNER,
ALBERT L. GABRIEL,

610 South Broadway,
Room 420,
Los Angeles, Calif. 90014,

Attorneys for Appellees.

FILED

MAR 19 1968

WM. B. LUCK CLERK

WILLIAM A. SHIRA, JR.,
Of Counsel for Appellees.

TOPICAL INDEX

	Page
Jurisdiction	1
Statement of the Case	3
The Patent in Suit	3
Appellees' Alleged Infringing Acts	5
Question Presented	6
Summary of Argument	8
Argument	9

I.

The Claims of the Patent in Suit on Their Face Cannot Be Read on Appellees' Structures	9
---	---

II.

The Claims of the Patent in Suit Must Be Con- strued so Narrowly by Reason of the File Wrapper History That Non-Infringement Is Clearly Established	9
Absence of Tapers in Band	14
Worson "Invention" a Narrow One in a Crowded Art	16
Absence of Serration Means	22
Appellant's Day in Court on Findings 27-33 ..	25

III.

The Prior Art Cited by the Patent Office Can Be Readily Understood by the Court Without the Aid of Expert Testimony, and Imposes Such Restriction in Construing the Claims That Appellees' Structures Must Fall Outside the Scope Thereof	27
--	----

	Page
Methode Electronics, Inc. v. Elco Corporation, 385 F. 2d 138, 155 U.S.P.Q. 353	37
Montmarquet v. Johnson & Johnson, 82 F. Supp. 469, 80 U.S.P.Q. 404, aff'd 179 F. 2d 240, 85 U.S.P.Q. 147, cert. den. 339 U.S. 979, 85 U.S.P.Q. 527	37
Moon v. Cabot Shops, Inc., 270 F. 2d 539, 123 U.S.P.Q. 60, cert. den. 361 U.S. 965, 4 L. Ed. 2d 546, 80 S. Ct. 596, 124 U.S.P.Q. 535	15
Morpul, Inc. v. Glen Raven Knitting Mill, Inc., 357 F. 2d 732, 149 U.S.P.Q. 1	31
Nelson v. Batson, 322 F. 2d 132	14, 15
Oxnard Cannery v. Bradley, 194 F. 2d 655, cert. den. 343 U.S. 978, 96 L. Ed. 1370.....	28
Park-In-Theatres v. Perkins, 190 F. 2d 137, 90 U.S.P.Q. 163	37
Parke, Davis & Company v. American Cyanamid Company, 207 F. 2d 571, 99 U.S.P.Q. 237	31
Rankin et al. v. King et al., 272 F. 2d 254, 123 U.S.P.Q. 397	37
Rohr Aircraft Corp. v. Rubber Teck, 266 F. 2d 613, 121 U.S.P.Q. 241	28
Ronel Corporation v. Anchor Lock of Florida, Inc., 325 F. 2d 889, 140 U.S.P.Q. 7, cert. den., 337 U.S. 924, 141 U.S.P.Q. 950	37
Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 74 L. Ed. 147	28
Santa Anita Mfg. Corp. v. Lugash, 369 F. 2d 964, 152 U.S.P.Q. 44	38
Sinclair & Carrol Co. v. Interchemical Corp., 325 U.S. 327, 65 U.S.P.Q. 297	29

	Page
Smith v. General Foundry Mach. Co. Inc., 174 F. 2d 147, 81 U.S.P.Q. 297, cert. den. 338 U.S. 869, 83 U.S.P.Q. 543	31
Steigleder v. Eberhard Faber Pencil Co., 176 F. 2d 604, 82 U.S.P.Q. 323, cert. den. 338 U.S. 893, 83 U.S.P.Q. 554	31
Sunbeam Lighting Company v. Pacific Associated Lighting Incorporated, 328 F. 2d 300, 140 U.S.P.Q. 512	32
Vermont Structural Slate Company, Inc. v. Tatko Brothers Slate Company, Inc., 233 F. 2d 9, 109 U.S.P.Q. 306, cert. den. 352 U.S. 917, 111 U.S.P.Q. 468	37
Walker v. General Motors Corp., et al., 362 F. 2d 56, 149 U.S.P.Q. 472	33, 34
Wham-O-Mfg. Co. v. Paradise Manufacturing Co., 327 F. 2d 748, 140 U.S.P.Q. 357	35
Yardley Created Products v. Clopay Corp., 324 F. 2d 932, 139 U.S.P.Q. 218	30, 31

Rules

Federal Rules of Civil Procedure, Rule 52(a)	2, 25
Federal Rules of Civil Procedure, Rule 56	26
Federal Rules of Civil Procedure, Rule 56(c)	30
Rules of the United States Court of Appeal, Rule 18	1
Rules of the United States District Court for the Central District of California, Rule 3(g)	25
Rules of the United States District Court of the Central District of California, Rule 3(g)1	25
Rules of the United States District Court for the Central District of California, Rule 3(g)2	26

Statutes	Page
United States Code, Title 28, Sec. 1291	3
United States Code, Title 28, Sec. 1338(a)	3
United States Code, Title 28, Sec. 1400(b)	3
United States Code, Title 28, Sec. 2201	3
United States Code, Title 28, Sec. 2202	3
United States Code, Title 35, Sec. 103	33, 34
United States Code, Title 35, Secs. 281-285	3

No. 22208

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EDOCO TECHNICAL PRODUCTS, INC.,

Appellant,

vs.

PETER KIEWIT SONS' Co., and THE B. F. GOODRICH
COMPANY,

Appellees.

APPELLEES' BRIEF.

Edoco Technical Products, Inc., plaintiff in the District Court, has appealed from a summary judgment in favor of Peter Kiewit Sons' Co., and The B. F. Goodrich Company, defendants below.

The jurisdictional statement and statement of the case contained in appellant's Opening Brief neglects to refer to pages of the record, as required by Rule 18 of this Court, and the statements are otherwise incomplete. For these reasons, appellees find it necessary to submit their own statements, which follow.

Jurisdiction.

Plaintiff-Appellant, Edoco Technical Products, Inc., filed its complaint [R 2]* in the U.S. District Court

*The letter R followed by a number denotes the page in the record on appeal where the item appears.

for the Central District of California, charging defendant Peter Kiewit Sons' Co., one of the appellees, with infringement of U.S. Patent No. 3,023,681 granted March 6, 1962 for Combined Weakened Plane Joint Former and Waterstop. The B. F. Goodrich Company made application to the District Court for leave to intervene as a party defendant [R 33], which was granted [R 112].

Both defendants filed answers to the complaint [Peter Kiewit R 48, B. F. Goodrich R 114], averring invalidity, denying infringement, and charging Edoco with unlawful misuse of the patent. The defendants also counterclaimed for declaratory judgment in accordance with their answers. Edoco replied to the counterclaims [R 99, 124].

Defendants filed a motion for summary judgment on the grounds set up in their respective answers and counterclaims [R 170]. The motion was granted on the ground of non-infringement [R 329, 371]. The District Court made no determination on the issues of validity and misuse of the patent.

The District Court made findings of fact and conclusions of law [R 351, A 4]*. These are not required, Rule 52(a) F.R.C.P., but "when made they are helpful to the appellate court." *Fromberg, Inc. v. Gross Manufacturing Company, Inc.*, 9 Cir., 1964, 328 F.2d 803, 140 U.S.P.Q. 641.

*The letter A followed by a number denotes the page in the Appendix bound with this brief. The District Court's findings and conclusions, memorandum opinions, and summary judgment, are all printed in the Appendix for the convenience of this Court. Also reproduced are Figures 1-4 of the drawing—in the patent in suit, and a defendants' interrogatory exhibit C depicting the accused structure.

The summary judgment [R 369, A 22], entered June 30, 1967, dismissed the complaint and the action on the merits with prejudice, and sustained the counterclaims for declaratory judgments on the ground of non-infringement.

Jurisdiction of the District Court was conferred by 28 U.S.C. §§1338(a) and 1400(b), and 35 U.S.C. §§ 281-285, 28 U.S.C. §2201 and §2202.

Plaintiff appealed July 20, 1967 [R 373]. This Court of Appeals has jurisdiction under 28 U.S.C. §1291.

The summary judgment appealed from disposes of the counterclaims as well as the complaint, and therefore should not be subject to remand as occurred in *Illinois Tool Works v. Brunsing*, 9 Cir., 1967, 378 F.2d 234, 153 U.S.P.Q. 771.

If any question remains as to the finality of the judgment, it is met by the last paragraph therein, conforming to the language approved in the *Illinois Tool* case, stating the express determination of the District Court that there is no just reason for delay and expressly directing the entry of final judgment.

Statement of the Case.

The Patent in Suit.

The patent in suit (Item A in the Book of Patents and File Wrapper, Figs. 1-4 of the drawing at A 24; also a copy is reproduced in Op. Br. 38*) is directed to a paving section which may be concrete, wherein is embedded a fracturing band vertically disposed, and a

*Op. Br. followed by a number denotes the page in Plaintiff-Appellant's Opening Brief to which reference is made.

waterstop horizontally disposed, the two parts being integrally connected together.

The upper portion of the band tapers upwardly for a distance greater than the thickness in the central region of the band, and the lower portion of the band tapers downwardly for a distance greater than the thickness of the central region of the band. Opposite edges of the band are straight.

Preferably, although not necessarily, the band and waterstop are formed of a resilient material, such as a synthetic plastic.

The waterstop comprising the horizontal strips is serrated to define longitudinal ribs, and additionally is provided at its outer edges with enlarged longitudinal anchor elements.

The purpose of the vertical band is to separate the poured concrete along a predetermined relatively straight line for a portion, but not all, of the depth of the concrete, whereby when the concrete cures and contraction occurs, the concrete will tend to crack and separate in or near the vertical plane of the edges of the band. Subsequently, when expansion and contraction occurs, due to changes in temperature, the same lines provide for such, and indiscriminate cracking is minimized, if not prohibited.

The waterstop is to prevent water which seeps through the uppermost crack from making its way to the ground underneath the concrete.

The foregoing description relates to the form of structure illustrated in Figures 1-4 of the patent in suit and is allegedly protected by claims 1 and 2. A sample of plaintiff's fracturing band and waterstop (gray in col-

or), responding to claims 1 and 2, is before the Court as Hearing Exhibit 1. Only claims 1 and 2 are charged to be infringed.

Inasmuch as appellant makes no contention that claim 3 is infringed, and such claim reads only on the form illustrated in Figures 5-8, such figures may be disregarded.

Appellees' Alleged Infringing Acts.

Appellee, Peter Kiewit Sons' Co., performed concrete lining operations in a section of what is known as the San Luis Canal in the general vicinity of Cantua Creek, in the County of Fresno, State of California. Included in the construction of said concrete lining are weakened plane joints, sometimes called contraction joints, comprising polyvinyl chloride strips cruciform in cross section which were inserted in the concrete as it was laid, or soon thereafter, while the concrete was still soft; certain of such strips extend longitudinally of the canal, and other strips extend transversely thereof. The lines represented by these strips generally define approximately 15 ft. squares, although this dimension varies.

Samples of the strips are before this Court as Interrogatory Exhibits. Exhibit A is a sample of blue material, and Exhibit B is a sample of white material. The blue material was laid longitudinally, and the white material was laid transversely. Interrogatory Exhibit C [R 21, A 25] is a drawing in which Figure 1 illustrates the blue material in place in the concrete as laid and before curing. Figure 2 illustrates the same cross section of concrete as Figure 1 after the concrete has cured and contraction lines have appeared. Figure 3 is a fragmentary plan view of a portion of the concrete

lining illustrating 15 ft. squares defined by the contraction lines. Insofar as this case is concerned, there is no distinction between the white and the blue material.

The vertical elements of the strips described, used by Peter Kiewit Sons' Co., are not tapered in either direction but embody flat, parallel outside surfaces. The horizontal waterstop element embodies no serrations, but merely enlarged beads along the outer edges.

Appellee The B. F. Goodrich Company furnished the strip material described above to appellee Peter Kiewit Sons' Co. which the latter used in the canal construction. In furnishing such material to Kiewit, B. F. Goodrich at all times had knowledge of its intended use by Kiewit, and of the manner in which Kiewit used it in the canal construction. The material was especially made and especially adapted for such use by B. F. Goodrich.

Question Presented.

The question expressly* presented by appellant's appeal can be reduced to the following:

Whether the District Court correctly determined that there was no genuine issue of material fact on the question of non-infringement and was justified in disposing of the case on that ground.

*The Court of Appeals may, if it chooses, also consider the question of validity on which, although not decided by the District Court, the record is sufficiently complete to make the finding one of law only. See *M.O.S. Corporation v. John I. Haas Co., Inc.*, C.A. 9, 1967, 375 F.2d 614, 153 U.S.P.Q. 153.

Both questions, and a third one, misuse of the patent, were raised in the District Court, by defendants' motion for summary

The motion was based upon the complaint and the defendants' answers thereto, the plaintiff's several answers to defendants' interrogatories [R 57, 144], a copy of the patent in suit, a copy of the file wrapper and contents of said patent, file wrapper references, copies of additional prior art (Book of Patents and File Wrapper), and various exhibits. Also before the District Court were an affidavit of Lee Worson [R 246] and an affidavit of Francis A. Utecht [R 243].

The District Court filed a memorandum opinion June 7, 1967 [R 329, A 1] stating that "the defendant's motion for summary judgment should be granted upon a consideration of the issue of non-infringement only. As to the question of validity and misuse of the patent, no determination can be made upon a motion for summary judgment as material questions of fact still remain to be resolved.

"The motion for summary judgment, therefore, is granted and defense counsel shall prepare new findings of fact, conclusions of law and judgment in accordance therewith."

Findings and Conclusions were made and filed June 30, 1967 [R 351, A 4], and on the same date the District Court filed another memorandum opinion [R 371, A 2] reaffirming and amplifying the first one.

judgment. We have no authority to support any suggestion that the misuse issue is before this Court in the present posture of the case.

Summary of Argument.

1. The claims of the patent in suit on their face cannot be read on the appellees' structures.

2. The claims of the patent in suit must be construed so narrowly by reason of the file wrapper history that non-infringement is clearly established.

3. The prior art cited by the Patent Office can be readily understood by the Court without the aid of expert testimony, and imposes such restriction in construing the claims that appellees' structures must fall outside the scope thereof.

4. A case for summary judgment was fully established and it was proper for the District Court to dispose of it accordingly.

5. If the Court of Appeals elects to affirm on the ground of invalidity, the record amply sustains such a determination.

ARGUMENT.

I.

The Claims of the Patent in Suit on Their Face Cannot Be Read on Appellees' Structures.

Appellant concedes this. In its Op. Br. 24, is the following language:

“Admittedly patent Claims 1 and 2 are not literally infringed by defendants' structure. This follows since defendants' vertical band is straight sided rather than being tapered, and defendant employs beads on the edges of the horizontal sealing strips, rather than the serrations means recited in the claims.”

Under axiomatic law the patentee is bound by the language he has employed in his claims. This should dispose of the case. Appellant endeavors to hang on by a thread, however, in arguing that the doctrine of equivalents must be considered. We discuss this as a part of the next point.

II.

The Claims of the Patent in Suit Must Be Construed so Narrowly by Reason of the File Wrapper History That Non-Infringement Is Clearly Established.

This subject is treated in detail in appellees' motion for summary judgment [R 170], and is summarized in the findings and conclusions [R 351, A 4], as well as the District Court's memorandum opinion [R 371, A 2].

Claims 1 and 2 are copied here for the Court's convenience, with the limitations italicized which impose the narrow construction.

1. In a paving section, a weakened plane joint, comprising: an elongated vertically extending paving fracturing band of lesser height than the depth of said paving section, *said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section* whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, *said strips each being formed with longitudinally extending serration* means that are firmly embedded within said paving as said paving cures, said sealing strips co-operating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint.

2. In a paving section, a weakened plane joint, comprising: an elongated vertically extending pav-

ing fracturing band of hollow, generally bulbular configuration, having a central air space, said band being of lesser height than the depth of said paving section, *said band having its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section, said band having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section* whereby said paving section undergoes fracturing in vertical alignment with the upper and lower edges of said band as said paving cures so as to define said weakened plane joint across said paving section; and a horizontally extending sealing strip integrally connected to each side of said band, *said strips each being formed with longitudinally extending serration means* that are firmly embedded within said paving as said paving cures, said sealing strips cooperating with the paving section on either side of said weakened plane joint to restrain the downward flow of water through said joint, said paving fracturing band and said sealing strips being formed of resilient material whereby relative movement is permitted between the portions of said paving section on either side of said weakened plane joint.

The factual background for the limitations is manifest and incontestable, and no amount of testimony, expert or otherwise, could change the facts.

Suffice it to say that Dr. Worson, the patentee, presented claims in the application as filed which were

broad enough to read on a structure embodying any cruciform insert to form the weakened plane joint and waterstop [F.W. 12 *et seq.*]*

He was met with art and rejections. He finally acquiesced in the Patent Office examiner's position, and in order to obtain the patent, after two personal interviews of his attorney with the examiner, cancelled all previous claims and submitted the claims which became the three claims of the patent [F.W. 47-49]. Some pertinent details are hereinafter reviewed.

The limitations included in the final set of claims, which rendered them allowable in the opinion of the examiner, specified for the first time in the case that the vertically extending paving fracturing band have "its upper portion tapering upwardly for a distance greater than the thickness of said band to provide a continuous straight edge below the upper surface of said paving section * * *," and "having its lower portion tapering downwardly for a distance greater than the thickness of said band to provide a continuous straight edge disposed above the lower surface of said paving section."

In support of this final set of claims, the attorney appended remarks [F.W. 50-51], which included the following language:

"The courtesy of the Examiner at the recent interview is hereby acknowledged.

At this interview, the desirability of revising the form of the claims so as to patentably distinguish over the prior art was discussed. In accord-

*F.W. followed by a number indicates the page in the Worson File Wrapper to which reference is made.

ance with this discussion, claims 13, 14 and 15 have been cancelled and new claims 16, 17 and 18 substituted therefor.

“The new claims specifically recite the applicant’s paving fracturing band as having an upper portion tapering upwardly for a distance greater than the thickness of the band to provide a continuous straight edge below the upper surface of the paving section. Similarly, the lower portion of the band is recited as tapering downwardly for a distance greater than the thickness of the band to provide a continuous straight edge disposed above the lower surface of the paving section. Because of this configuration, the paving section undergoes fracturing in vertical alignment with the upper and lower edges of the band as the paving cures so as to define a weakened plane joint across the paving section.”

Further, in order to support these claims, and after another discussion of his attorney with the Examiner, Worson inserted in the specification the following language [F.W. 58]:

“The upper portion of band 12 tapers upwardly for a distance greater than the thickness of the band to provide a continuous upper straight edge while the lower portion of the band tapers downwardly for a distance greater than the thickness of the band to provide a continuous straight edge at the lower end of the band.”

This insert is found in the patent at Column 2, lines 43-49.

In view of this prosecution as outlined, the patentee has excluded himself from asserting that the use of a fracturing band which is not tapered falls within the scope of his claims. A band which has parallel surfaces is not tapered.

Absence of Tapers in Band.

It is manifest from the appropriate exhibits and description, as well as admission by appellant, that the accused structures do not include any band having either its upper portion tapering upwardly or its lower portion tapering downwardly. Consequently, these structures are outside the scope of plaintiff's claims and do not infringe claim 1 or claim 2.

Appellant contends that the Worson Affidavit [R 246] and the Utecht Affidavit [R 243] require application of the doctrine of equivalents (Op. Br. 24-36).

The passages in these affidavits relied on by appellant are argumentative rather than factual. Thus Worson asserts that the Kiewit "joint employs each of the elements or their equivalents recited in Claims 1 and 2 of my patent."

Appellant's citation of *Nelson v. Batson*, 9 Cir., 322 F.2d 132 (Op. Br. 24) does nothing to advance its cause. The Court there discusses the principles of the doctrine of equivalents. It agrees with the district court in the case that the invention was a minor improvement in a crowded field, that the range of equivalents to which the inventor was entitled was at best narrow, and that to expand the patent monopoly appreciably be-

yond the precise combination of old elements which he claimed would reward him disproportionately.

Appellant insists that the vertical taper language of the claims is not a proper ground for file wrapper estoppel (limiting equivalency) unless the tapering "language goes to the heart of the invention." (Op. Br. 21). In support it cites *International Manufacturing Co. v. Landon, Inc.*, 9 Cir., 336 F.2d 723.

Appellant classifies the Worson patent claims as combination claims (Op. Br. 11). There is no legally recognizable or protected "heart" of the invention in a combination patent. *Nelson v. Batson, supra*.

Moreover, in a combination patent, redefinition of an element gives rise to file wrapper estoppel, when "the redefinition was necessary to obtain the patent." *International Manufacturing Co. v. Landon, supra*, 336 F.2d at page 727.

It cannot be denied that the redefinition of the fracturing band was necessary to obtain the Worson patent. Worson's attorney did more than change the "form" of the claims (Op. Br. 35). He changed the "substance."

The patentee thus narrowed his claims in order to escape rejection. "By thus limiting his claims, he is estopped to enlarge them by resort to the doctrine of equivalents. *D & H Electric Co. v. M. Stephens Mfg. Inc.*, 9 Cir., 233 F.2d 879, 883-884." *Moon v. Cabot Shops, Inc.*, 9 Cir., 270 F.2d 539, 545, 123 U.S.P.Q. 60, 64. Cert. den., 361 U.S. 965, 4 L.ed 2d 546, 80 S.Ct. 596, 124 U.S.P.Q. 535.

**Worson "Invention" a Narrow One in
a Crowded Art.**

Appellant attempts to qualify the Worson "invention" as pioneer in character, *i.e.*, the first to combine a weakened joint strip former and horizontal sealing strips [water stops] (Op. Br. 4, 11). This is the premise for the contention that equivalency brings appellees' structure within the claims (Op. Br. 24).

In support of his contention, appellant redefines the entire Worson "invention" on page 23 of its Opening Brief in the following language (*italics are the appellant's*):

"What was new and what was patented by Worson was the combination of a length of paving in which the fracturing band was correlated with the paving so that the fracturing band not only formed the weakened plane joint but also served as a water-stop in the completed joint."

The quoted language is merely a restatement of the subject matter as defined in the original claims 1-12, and in the substitute claims 13-15.

Claims 1-10 recited "A combined weakened plane joint former and waterstop device." Claim 12 was for a "waterstop device" *per se*. The paving section was not positively recited.

Claims 1-12 were rejected by the Examiner as "unpatentable" over cited prior patents [F.W. 26]. Worson's attorney made a minor amendment to the claims without changing their combination character and argued their allowability [F.W. 27].

The Examiner again rejected the claims as "unpatentable" over prior art [F.W. 32] including Fischer

No. 2,540,251 (Item N in Book of Patents). He also advised that "Applicant should point out distinguishing structural features recited in his claims [F.W. 33].

Fischer No. 2,540,251 illustrates and describes exactly what appellant's counsel says in the italicized quotation from his Brief is patented by Worson.

Thus, Fischer states:

"This invention relates to contraction joints embedded in concrete pavements as a means whereby cleavage of a section of pavement under internal stresses of contraction may be restricted to desirable geometrical lines." Col. 1, lines 1-5.

Further:

"One object of the invention is to provide suitable constructions of thin subdivision plates which, by extending through a suitable proportion of the vertical dimension of the paving slab * * * will enable the slab under stresses of contraction developing therein, to pull apart in said planes rather than elsewhere." Col. 1, lines 13-20.

Then:

"Another object of the invention is to provide waterstop means in association with any of the various types of contraction joint plates herein contemplated; * * *." Col. 2, line 7. Fischer mentions various materials, including "rubberized bituminous material." Col. 2, lines 25-26.

After the citation of Fischer, Worson's attorney interviewed the Examiner, and filed an amendment cancelling claims 1-12, substituting claims 13-15, and argued for allowability of such combination claims. These claims were in form defining a combination of ele-

ments making up a paving section with elements as set forth by appellant's counsel in the italicized quotation above.

They were rejected as "unpatentable" over the art [F.W. 41].

Worson's attorney asked for reconsideration, and argued patentability [F.W. 42].

Without waiting for an office action, the attorney again interviewed the Examiner and thereupon filed a supplemental amendment presenting the claims which appear in the patent [F.W. 47].

In his remarks, previously quoted, the attorney referred to the desirability of revising the "form" of the claims. But the expressed purpose of the new claims was, in his own language, "to patentably distinguish over the prior art." If they did not, and the "invention" is the redefined combination asserted by appellant as quoted above, and can be expanded by reference to equivalents, appellant is sealing the doom of its patent for invalidity.

Appellant's attempt by affidavits and argument to broaden the Worson claims by so redefining the combination and applying to the redefinition the doctrine of equivalents not only is contra to the *D & H Electric* case, *supra*, but is squarely rejected by the United States Supreme Court in the companion cases of *Graham v. John Deere*, *Calmar v. Cook Chemical Company*, and *Colgate-Palmolive Company v. Cook Chemical Company*, 383 U.S. 1, 15 L.ed. 2d 545, 86 S.Ct. 684, 148 U.S.P.Q. 459, opinion by Mr. Justice Clark. We quote some of the Court's language, 383 U.S. at 32, 15 L.ed. 2d at 564, which applies directly to counsel's departure from the position he took before the Patent Office.

“Let us first return to the fundamental disagreement between the parties. Cook Chemical, as we noted at the outset, urges that the invention must be viewed as the overall combination, or—putting it in the language of the statute—that we must consider the subject matter sought to be patented taken as a whole. With this position, taken in the abstract, there is, of course, no quibble. But the history of the prosecution of the Scoggin application in the Patent Office reveals a substantial divergence in respondent’s present position.

“As originally submitted, the Scoggin application contained 15 claims which in very broad terms claimed the entire combination of spray pump and overcap. No mention of, or claim for, the sealing features was made. All 15 claims were rejected by the Examiner because (1) the applicant was vague and indefinite as to what the invention was, and (2) the claims were met by Lohse. Scoggin canceled these claims and submitted new ones. Upon a further series of rejections and new submissions, the Patent Office Examiner, after an office interview, at last relented. It is crystal clear that after the first rejection, Scoggin relied entirely upon the sealing arrangement as the exclusive patentable difference in his combination. It is likewise clear that it was on that feature that the Examiner allowed the claims. In fact, in a letter accompanying the final submission of claims, Scoggin, through his attorney, stated that ‘agreement was reached between the Honorable Examiner and applicant’s attorney relative to *limitations* which must be in the claims in order to define novelty over the previously applied disclosure of Lohse when consid-

ered in view of the newly cited patents of Mellon and Darley, Jr.' (Italics added.)

“Moreover, those limitations were specifically spelled out as (1) the use of a rib seal and (2) an overcap whose lower edge did not contact the container cap. * * * In other words, the Scoggin invention was limited to the use of a rib—rather than a washer or gasket—and the existence of a slight space between the overcap and the container cap.”

Returning to the Utecht affidavit, it is merely an argument that the *tapers* recited in the claims in order to secure their allowance were for the purpose of describing the upper and lower edges of the fracturing band as “straight edges.” That such an assertion is specious is demonstrated by the fact that there are numerous fracturing bands with straight edges in the prior art. See file wrapper references Heltzel No. 2,330,214, and Kelley No. 2,759,403 (Items O and P in Book of Patents). A common door has upper and lower straight edges without being tapered. We again emphasize that the recited taper in the claims was the necessary limitation to obtain the patent.

A case uniquely in point on the subject of a taper limitation and non-infringement is *Fowler v. Detroit Bedding Co., et al.*, 47 F.2d 756 (C.A. 6, 1931). The claim in suit read as follows:

“A padding bandage consisting of a long, narrow strip formed of a central core of relatively stiff and strong paper in combination with and inclosed by an outer surface made up of an unabsorbent fibrous bat having tapered edges folded about the core and with its tapered edges lapped on one side of the paper core.”

In affirming the District Court's judgment of non-infringement, the Court of Appeals said:

"The defenses were invalidity and noninfringement. If the patent is valid (which we need not decide), the invention consists in so tapering and overlapping the ends of the bat that when it is folded about the core a bandage of uniform thickness results, or in the simplicity with which the bandage is manufactured, by merely tapering the ends of the bat before folding it. For such a product the appellant has limited the claim to 'tapered edges lapped on one side of the paper core' and he is bound thereby. *Lakewood Engineering Co. v. Stein*, 8 F. (2d) 713, 715 (C.A.C. 6); *Michigan Engine Valve Co. v. Monarch Mfg. Co.*, 233 F. 107, 110 (C.C.A. 6); *McCallum v. Pittsburgh & Cleveland Coal Co.*, 268 F. 831, 835 (C.C.A. 6). All the substantial evidence indicates that appellee's product lacked this element of appellant's combination and therefore did not infringe. *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U.S. 399, 410, 25 S.Ct. 697, 49 L.Ed. 1100."

Referring to the defendants' structure, the Court said:

"* * * Any slight tapering of the edges was not due to design, but was incidental to the manner in which the sheet or bat of the material came from the machine or to the effect of forcing it into the pleat of the cushion."

In the present case the District Court, in its memorandum opinion of June 30, 1967 [R 371, A 2], specifically determined in respect to the tapering form of the Worson band 12, "that this limitation is an essen-

tial element of the claim, in fact the very element which the examiner thought made the claim patentable. Since the alleged infringing device does not come within this limitation, its obvious non-infringement leaves no substantial question of fact to be determined at the time of trial.”

Absence of Serration Means.

The second element of the Worson patent claims which is clearly omitted from appellees’ structure is the serration means on the waterstop strips.

The claims in suit call for horizontally extending sealing strips “each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures.” The specification states that the sealing strips “are serrated to define longitudinal ribs 19 and are formed at their free ends with an enlarged anchor element 20.” (Patent Col. 2, lines 55-57).

The serrations and the anchor elements are independent *and* separate. Their respective functions are described in the patent, Col. 2, paragraph beginning line 68 as follows:

“Referring now to FIGURE 4, at such times as the slabs 26 and 28 undergo relative movement away from one another, the aforescribed device D will serve as an effective waterstop. In this regard, the water 30 entering the slot 22 above the band 12 will not be able to flow downwardly past the sealing strips 14 and 16 inasmuch as the ribs 19 thereof will cooperate with the ridges 31 formed in the paving material wherein they are embedded to prevent any percolation of such water outward-

ly along the sealing strips. * * * It should also be observed that the provision of the enlarged anchor elements 20 of the sealing strips 14 and 16 reduce the possibility that these strips will become loosened from the paving material P during relative movement between the slabs 26 and 28.”

While the serrations are included as claim elements, the enlarged anchor elements are not mentioned in the claims.

The longitudinally extending serrations were included in original application claims 3, 4, 7, 8 and 12 but no enlarged anchor means [F.W. 14-23].

Original claims 6 and 10 included enlarged anchor means but no serrations [F.W. 17 and 21].

Original claim 11 contained both “longitudinally extending serrations” and “enlarged anchor means.” Thus they are treated as separate and independent elements.

These claims were all rejected. In due time they were cancelled, and claims 13-15 substituted [F.W. 35-37]. The new claims included “longitudinal serration means” but no enlarged anchor means. The claims were rejected.

In the attorney’s response to the Patent Office, F. W. 42 *et seq.*, he argued at page 43:

“Assuming, however, that the Kelley device were formed of the resilient material of the British patent, the resulting device would not meet the limitations of the applicant’s claimed combination nor would it be workable. The applicant’s horizontally extending sealing strips are recited as being formed with longitudinally extending serration means. *It is absolutely essential* that such serration means be

provided in order to lock the applicant's trips to the adjoining paving slabs 60 and 62. Unless these sealing strips are so locked to the adjoining paving slabs, they cannot function as a waterstop, particularly, when the adjoining paving slabs undergo horizontal separation, as indicated in Fig. 4 of the applicant's drawings." (Emphasis added).

These "absolutely essential" longitudinally extending serration means that are firmly embedded within the paving as the paving cures were carried over into claims 16-18 which became claims 1-3 of the patent.

Worson's attorney further emphasized the importance of these serration means in his argument, F.W. 51 in the following language:

"The new claims [16-18] also recite the applicant's integral horizontally extending sealing strips 14 and 16 as being formed with longitudinally extending serration means that are firmly embedded within the paving as the latter cures. This arrangement insures that the sealing strips will restrain the downward flow of water through the joint while relative movement is permitted by the paving sections on either side of the weakened plane joint."

Nothing was said concerning the enlarged anchor means. They are the marginal enlargements 20. We repeat, they are not included as elements of the combination claimed in the patent claims.

As pointed out above, the Worson affidavit, page 12 [R 257], makes reference to the defendants' structure as having horizontally extending sealing strips "formed with longitudinally extending projections." These can only be the marginal beads, and correspond in position

and function to the Worson patent enlarged anchor elements or means 20. Worson's affidavit changes terminology and (same page) calls defendants' marginal beads 'generally cylindrical protrusions.' Either terminology is acceptable, and taken in conjunction with a lack of reference to the Worson enlarged anchor elements 20 constitutes an admission that the defendants have no serrations. There being no substitute whatever, there can be no equivalent.

Appellant would have this Court believe that because the file history contains no language "indicating that the patentee narrowed his description" of the serration means "because of the prior art," (Op. Br. 24) there is no estoppel to broadly construe the element.

In this argument, appellant overlooks the proposition that the file history may be referred to in order to ascertain what the applicant urged as new and as constituting a material element of the patent claims.

Appellant's Day in Court on Findings 27-33.

Appellant argues that it did not have its day in court on the subject of serration means (Op. Br. pp. 20-21). This is developed by an attack upon findings of fact 27-33 and the procedural steps culminating in their adoption and filing.

Such criticism is based upon a misconception. Rule 52(a) F.R.C.P. provides "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 * * *."

Local Rule 3(g) 1. Rules of the U.S. District Court for the Central District of California* does re-

*Erroneously referred to in Appellant's Opening Brief, pp. 17, 19, 20, 30 and 42 as Local Rule "4".

quire that "There shall be served and lodged with each motion for summary judgment pursuant to Rule 56 of the F.R.C.P. proposed findings of fact and conclusions of law and proposed summary judgment. Such proposed findings shall state the material facts as to which the moving party contends there is no genuine issue."

There is no requirement in the rules that the findings ultimately be made or filed.

The provision seems to be mainly for the purpose of focusing the points in controversy because Local Rule 3(g) 2 states that "Any party who opposes the motion shall, * * * serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated."

These presentations are preliminary only and the Court is not bound by either of them.

The serration means of the Worson patent is referred to in the motion for summary judgment [at R 173], and absence of serration means in appellees' structure was pointed out in the motion [at R 188]. Proposed finding 12 [at R 221] also recites this fact. Vigorous response was offered in the Worson affidavit [at R 257]. Arguments were presented in open court [Transcript of Proceedings June 5, 1967 at pages 19-24]. After the District Court's decision, new findings were lodged [R 351] dealing in fuller detail with the serration means subject [at R 362-365]. After a hearing [Transcript of Proceedings June 26, 1967] the findings lodged [R 351] were signed and filed June 30, 1967.

Appellant's contention is vacuous. Even if the controversy over serration means lacked the historical sequence outlined, it would not be grounds for reversal.

III.

The Prior Art Cited by the Patent Office Can Be Readily Understood by the Court Without the Aid of Expert Testimony, and Imposes Such Restriction in Construing the Claims That Appellees' Structures Must Fall Outside the Scope Thereof.

The examiner cited seven patents as references during the prosecution of the Worson application. These are identified and briefly described in Findings of Fact 17, 19, and 21 [R 357, and A 10-12]. They disclosed elastomeric joints and joints of other materials for concrete pavements, of cruciform and other cross sectional forms, serving as weakened plane joints and waterstops, the weakened plane joints providing for fracturing of the concrete along desired lines, and the waterstops preventing water from seeping through the concrete. Copies of the patents are in the Book of Patents before the court. The findings amply demonstrate that the District Court had no difficulty in understanding the disclosures.

In addition to the file wrapper references, the motion for summary judgment presents numerous additional examples of prior art [R 176]. Copies are in the Book of Patents, and reproductions of pertinent views of the respective drawings are contained in the motion. The District Court apparently felt so convinced of its position on non-infringement that it made no mention in its memorandum opinions nor in the find-

ings of these additional patents. They show even more forms of cleavage inserts and waterstops than are revealed in the references of record. They are readily understood without the aid of expert testimony, and if examined reinforce the narrow construction imposed of necessity upon the Worson patent claims.

IV.

A Case for Summary Judgment Was Fully Established, and It Was Proper for the District Court to Dispose of It Accordingly.

The facts compelling the conclusion of noninfringement are clearly established by plaintiff's admissions, undisputed documents of record, exhibits included within the documents, and the exhibits before the Court. In such case, ". . . the question of infringement resolves itself in each case into one of law, depending upon a comparison between the structure disclosed on the face of the patent and the [accused] device . . ." *Sanitary Refrigerator Co. v. Winters*, (1929) 280 U.S. 30, 36, 74 L.Ed. 147, 153.

Accord *Kwikset Locks v. Hillgren*, (9 Cir., 1954), 210 F.2d 483, 488, 489; cert. den. 347 U.S. 989, 98 L.Ed. 1123; *Oxnard Cannery v. Bradley*, (9 Cir., 1952), 194 F. 2d 655, 659, cert. den. 343 U.S. 978, 96 L.Ed. 1370; *Rohr Aircraft Corp. v. Rubber Teck*, (9 Cir., 1959), 266 F.2d 613; 121 U.S.P.Q. 241.

Since the undisputable facts clearly establish that none of the identities required by law to find infringement are present, the legal conclusion on noninfringement is inescapable.

The District Court expressly held that there is no genuine issue of material fact on the question of non-

infringement. Memorandum Opinion filed June 30, 1967 [R. 371, at 372], Finding 9 [R. 354].

Appellant's attempts to create issues (Op. Br. 30) are insubstantial. The file history is unambiguous. Neither it, nor the patent claims can be "explained" or "qualified" by affidavits.

Disposition of the case on a finding of noninfringement without passing on validity is sanctioned. *M.O.S. Corp. v. John I. Haas Co., Inc.*, 9 Cir., 1967, 375 F.2d 614, 153 U.S.P.Q. 153. *Supra*, footnote p. 6.

Because of the doctrine announced in *Sinclair & Carol Co. v. Interchemical Corp.*, 1954, 325 U.S. 327, 65 U.S.P.Q. 297, that of the questions of noninfringement and validity, validity has the greater public importance, and that usually the better practice is to inquire fully into the validity of a patent, this Court considered and now recognizes that such is not a rule but is only an admonition. *M.O.S. Corp., supra*.

Bearing in mind that the admonition is not to be lightly disregarded, we will briefly discuss the situation presented by the present case.

The patented structure is not one which the public clamors to buy, or has to have. It is not a necessity of life, or even a convenience to the consuming public. By its nature it is utilized, if at all, by contractors in construction projects. However, it is not a necessity for them. There are various ways of achieving the same purpose and result, as disclosed in the Worson patent itself, and in the prior art before the Court. Appellees obtain the structural requirements by means held not to infringe, and also by the use of an alternative form of insert which appellant does not even charge to be an infringement. See the voluntary admission of

appellee Peter Kiewit Sons' Co. in Preface to Interrogatory No. 33 [R. 128], physical Interrogatory Exhibit G, and Interrogatory Exhibit H, a drawing [R 140]. Appellant's answer to Interrogatory No. 33 is a disclaimer of any charge of infringement by the alternative form [R 144].

Under these circumstances, the public interest in the validity or invalidity of the patent is not clearly discernible, and efficient administration of justice justifies complete disposition of the controversy between the parties by the holding of noninfringement.

Appellant's Citations Are Inapposite to the Present Case.

The various decisions cited by appellant where summary judgment was held by a court of appeals to be improper all respond to the interpretation of Rule 56(c) F.R.C.P. stated in *Cee-Bee Chemical Co., Inc. v. Delco Chemicals, Inc.*, 9 Cir., 263 F.2d 150, 152, 120 U.S.P.Q. 72, 73.

"If the conclusions reached by the trial court required it to first resolve a genuine issue as to a material fact, the case should not have been disposed of on a motion for a summary judgment." (Quoted on p. 29 of Op. Br.).

This and other cases rejecting disposition by summary judgment involve various facts in controversy presented by conflicting affidavits, uncertainties, material issues on which evidence should have been presented, or failure to include essential documents in the record.

Appellant lays great stress on *Yardley Created Products v. Clopay Corp.*, 7 Cir., 324 F.2d 932, 139 U.S.P.Q. 218 (Op. Br. 29). The Court there noted

that the issue of file wrapper estoppel presented factual questions. The real problem in the *Yardley* case was that a necessary file wrapper history and the prior art were not included in the record.

Decisions Which Sustain Summary Judgment on Non-Infringement.

In full support of appellees' position, see *Morpul, Inc. v. Glen Raven Knitting Mill, Inc.*, 4 Cir., 357 F.2d 732, 149 U.S.P.Q. 1. There the court affirmed a summary judgment of non-infringement of a patent for a combination garment of ladies' seamless stockings and panty. The meaning of a U-shaped "seam" was involved. The patentee sought a broad interpretation and offered to show that workmen skilled in the art considered the term broad enough to cover the defendant's crotch piece. The court pointed out that the file history was so incontrovertibly clear that no genuine issue of fact existed, that the claim must be interpreted narrowly, and so was not infringed.

The same conclusion applies to the present case.

See also other cases affirming summary judgment for noninfringement of mechanical patents:

Smith v. General Foundry Mach. Co. Inc., 4 Cir., 174 F.2d 147, 81 U.S.P.Q. 297, cert. den. 338 U.S. 869, 83 U.S.P.Q. 543 (tobacco drying house).

Steigleder v. Eberhard Faber Pencil Co., 1 Cir., 176 F.2d 604, 82 U.S.P.Q. 323, cert. den. 338 U.S. 893, 83 U.S.P.Q. 544 (liquid ink eraser for fountain pens using principle of ball valve).

Parke, Davis & Company v. American Cyanamid Company, 6 Cir., 207 F.2d 571, 99 U.S.P.Q. 237 (patent for antianemia vitamin products).

Sunbeam Lighting Company v. Pacific Associated Lighting Incorporated, 9 Cir., 328 F.2d 300, 140 U.S.P.Q. 512 (design patent for combined hospital and bed light fixture and service outlet control panel).

Fromberg, Inc. v. Gross Manufacturing Company, *supra*, 9 Cir., 328 F.2d 803, 140 U.S.P.Q. 641 (device to repair tubeless automobile tire).

Attention is also called to a well reasoned and documented district court opinion by the late Judge William C. Mathes, in *Dolgoft v. The Kaynar Company*, S.D. Cal., Central Div., 18 F.R.D. 424, 108 U.S.P.Q. 66 (no F.Supp. citation found, and no appeal noted). The patent held not infringed was for a device to hold hair in place so as to form a pin curl while the hair is being set.

V.

If the Court of Appeals Elects to Affirm on the Ground of Invalidity, the Record Amply Sustains Such a Determination.*

The subject of invalidity of the Worson patent was treated at length in the motion for summary judgment, commencing at page 7 [R 176].

The German Gebrauchsmuster 1,756,880 [R 176, and Item B in Book of Patents] is conceded by appellant to be prior art, but its applicability is challenged in the Worson affidavit on the grounds that the cruciform plastic insert is employed in a different type of concrete construction than that contemplated by Worson.

*We assume that appellant's conclusion (Op. Br. 37) that "The District Court erred in * * * holding the patent in suit invalid" was unintended. The holding was non-infringement.

The German insert embodies a vertical band, horizontal wings, and serration means. The only thing it lacks is a taper in the vertical bands.

To utilize the German insert in wet concrete would be obvious in the light of various prior art disclosures of inserts used to form weakened plane joints. See Fischer, U.S. No. 1,997,545, Heltzel, U.S. No. 1,946,972 Figure 8, McInerney, U.S. Reissue 17,361, or Heltzel, U.S. No. 2,025,449 Figures 8A and 8B. Tapering the vertical band cannot be unobvious. Appellant itself says that it was old in the art. (Op. Br. 23).

Appellees' case for affirmance on the ground on invalidity could be predicated entirely on *Walker v. General Motors Corp., et al.*, 9 Cir., 1966, 362 F.2d 56, 149 U.S.P.Q. 472, or *Alladin Plastics, Inc. v. Jerrold Stephan Co.*, 9 Cir. 1966, 362 F.2d 532, 150 U.S.P.Q. 10.

The patent involved in the *Walker* case contained three claims defining combinations wherein the asserted novelty was a fuel tank built into a fender. The prior art was represented primarily by an article in a French magazine.

On a motion for summary judgment, the district court held the patent claims to be invalid for anticipation, 225 F. Supp. 350, 139 U.S.P.Q. 434.

The Court of Appeals for the Ninth Circuit affirmed the judgment, and in doing so, ruled that two of the three claims were not actually anticipated but were invalid under 35 U.S.C. §103 for obviousness.*

*That section reads:

§ 103. *Conditions for patentability; non-obvious subject matter*

(This footnote is continued on the next page)

In doing so, this Court rejected contentions of the plaintiff that factual disputes did exist which were relevant to the issue of obviousness, particularly as to the prior art, the level of ordinary skill in the art, also unsatisfied need, commercial success, and acceptance of a license by another corporation.

A month after the *Walker v. General Motors* decision this Court affirmed another district court decision holding patents invalid for obviousness on a motion for summary judgment. *Alladin Plastics, Inc. v. Jerrold Stephan Co., supra.*

Two of the patents involved “bucket seat” chair construction, and the third was for a design.

The following paragraphs from Circuit Judge Browning’s opinion clearly define the policy in the Ninth Circuit:

“[1] A patent may be declared invalid by summary judgment on the ground of obviousness (35 U.S.C. § 103) if it appears from undisputed facts that the subject matter of the patent would have been obvious to a person skilled in the art who was aware of such matters as were in the public domain. *Walker v. General Motors Corp.*, 362 F.2d 56 (9th Cir. 1966).

* * *

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

“[3] All three patents are readily understood. The claimed advances over prior art are clearly described in appellant’s answers to interrogatories. Detailed exposition of the prior art and of the level of skill of persons engaged in it were unnecessary, for it is clear from the undisputed facts that the patents disclose advances which would have been obvious. The advances being obvious, appellant’s proffered evidence of the pre-patent problems and the success of appellant’s patented solutions could not have affected the result. *Walker v. General Motors Corp.*, 362 F.2d 56 (9th Cir. 1966).”

The Court of Appeals can decide the issue of invalidity if it so desires even though the District Court did not. *M.O.S. Corporation v. John I. Haas Co., Inc.*, *supra*, 9 Cir., 375 F.2d 614, 153 U.S.P.Q. 153; *Illinois Tool Works, Inc. v. Brunsing et al.*, *supra*, 9 Cir., 378 F.2d 235, 153 U.S.P.Q. 771.

It is recognized that this Court has ruled summary judgment of invalidity to be improper where questions of fact, including whether an improvement was obvious, are such as to require presentation of evidence. *Hughes Blades, Inc. v. Diamond Tool Associates*, 9 Cir., 300 F.2d 853, 132 U.S.P.Q. 305; *Cee-Bee Chemical Co., Inc. v. Delco Chemicals, Inc.*, *supra*, 9 Cir., 263 F.2d 150, 120 U.S.P.Q. 72.

Such cases can be distinguished from the one at bar, which parallels other decisions of this Court, where the subject matter is apparent and readily understood.

See also *Wham-O-Mfg. Co. v. Paradise Manufacturing Co.*, 9 Cir., 1964, 327 F.2d 748, 140 U.S.P.Q. 357, holding invalid for obviousness on a motion for sum-

mary judgment a patent on an amusement slide combined with a sprinkler to make it more slippery. Circuit Judge Koelsch said, in part, at page 751:

“* * * We think, as did the trial court, that the combination was obvious. Particularly apt are the following extracts from *Glagovsky v. Bowcraft Trimming Co.*, 267 F.2d 479 (1st Cir. 1959), cert. den. 361 U.S. 884, 80 S.Ct. 155, 4 L.Ed. 2d 120 (1959), a case very much like the one before us: ‘The prior art and the patent claims are so simple that they can be readily understood by any normally intelligent person without the aid of expert testimony. There was, therefore, no error below in disposing of the plaintiff’s suit on the motions for summary judgment and their supporting affidavits, depositions and exhibits.’ (267 F. 2d p. 480). ‘* * * The plaintiff’s advance may well be useful and ingenious. But making full allowance for the presumption that the patent is valid and placing the burden of establishing its invalidity on the defendant, 35 U.S.C. § 282, it does not seem to us that even in the light of plaintiff’s commercial success it can be said that the plaintiff’s contribution, viewed either against the background of the allied prior arts * * * or against the background of the particular prior art * * * can be called an invention without defining that term to describe no more than the sort of advance to be expected from any ordinarily skillful mechanic conversant with any of the arts involved.’ (267 F.2d p. 482).”

Other cases decided by this and other courts of appeal, adjudging patents invalid in summary judgment proceedings are:

Montmarquet v. Johson & Johnson, 3 Cir., 82 F. Supp. 469, 80 U.S.P.Q. 404, aff'd 179 F.2d 240, 85 U.S.P.Q. 147, cert. den. 339 U.S. 979, 85 U.S.P.Q. 527, patent on athletic supporter.

Park-In-Theatres v. Perkins, 9 Cir., 190 F.2d 137, 90 U.S.P.Q. 163, holding invalid for want of invention, a patent on an outdoor theater.

Bobertz v. General Motors Corp., 6 Cir., 228 F.2d 94, 107 U.S.P.Q. 338, holding invalid a patent for an automobile hood.

Vermont Structural Slate Company, Inc. v. Tatko Brothers Slate Company, Inc., 2 Cir., 233 F.2d 9, 109 U.S.P.Q. 306, cert. den. 352 U.S. 917, 111 U.S.P.Q. 468, holding invalid a patent for a pallet for holding, transportation and/or storage of slate slabs.

Rankin et al. v. King et al., 9 Cir., 272 F.2d 254, 123 U.S.P.Q. 397, holding invalid a patent for a drapery and rod combination.

Ronel Corporation v. Anchor Lock of Florida, Inc., 5 Cir., 325 F.2d 889, 140 U.S.P.Q. 7, cert. den., 337 U.S. 924, 141 U.S.P.Q. 950, holding invalid a patent for a metal fastener, on comparison with prior art, notwithstanding opposing affidavits.

Methode Electronics, Inc. v. Elco Corporation, 3 Cir., 385 F.2d 138, 155 U.S.P.Q. 353, holding invalid a patent for an electrical connector.

In considering the question of invalidity here, it is pertinent to recall the "severe test" rule approved by this Court. The Worson patent is for a combination of

old elements. To be sustained, it must meet the "severe test" whether the whole in some way exceeds the sum of its parts to produce unusual or surprising consequences from the unification of the elements. *Santa Anita Mfg. Corp. v. Lugash*, 9 Cir., 369 F.2d 964, 152 U.S.P.Q. 44.

Weakened plane joints in concrete construction, and waterstops are shown to be very common. Moreover, they are illustrated not only singly, but combined in a single unit. Worson does not provide anything which produces unusual or surprising consequences. His vertical bands weaken the concrete to insure predetermined lines of cracking, and his horizontal strips seal off water, all in the same fashion as was known long before him.

Commercial success, long felt want, level of ordinary skill in the art, even if proved cannot tip the scales of patentability in a case such as this, where his whole conception was obvious to any normally intelligent person upon a perusal of the clear disclosures in the prior art.

Conclusion.

The narrow definitions in the claim language, the file wrapper history and limitations imposed thereby, and the prior art, all of which are readily understood without resort to testimony, expert or otherwise, either singly or *in toto*, fully support the District Court's determination that there was no genuine issue of material fact on the question of non-infringement, and the Court properly disposed of the case on such ground.

No discernible substantial public interest in the validity or invalidity of the patent sufficient to require adjudication appears from the record, but if the Court of Appeals elects to consider that question, claims 1 and 2 of the patent, which are the only ones in issue, are invalid for obviousness.

Los Angeles, California, March 12, 1968.

Respectfully submitted,

HUEBNER & WORREL,
HERBERT A. HUEBNER,
HARLAN P. HUEBNER,
ALBERT L. GABRIEL,

By HERBERT A. HUEBNER,
Attorneys for Appellees.

WILLIAM A. SHIRA, JR.,
Of Counsel for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HERBERT A. HUEBNER





APPENDIX CONTAINING PORTIONS
OF RECORD ON APPEAL

Memorandum Opinion.

[R 329]

United States District Court, Central District of California.

Edoco Technical Products, Inc., Plaintiff, vs. Peter Kiewit Sons' Co., Defendant, and The B. F. Goodrich Company, Intervening Defendant. No. 66-1497-JWC.

Filed: June 7, 1967.

I am of the opinion that the defendant's motion for summary judgment should be granted upon a consideration of the issue of non-infringement only. As to the question of validity and misuse of the patent, no determination can be made upon a motion for summary judgment as material questions of fact still remain to be resolved.

The motion for summary judgment, therefore, is granted and defense counsel shall prepare new findings of fact, conclusions of law and judgment in accordance therewith.

Dated this 7 day of June, 1967.

Jesse W. Curtis
United States District Judge

Memorandum Opinion.

[R 371]

United States District Court, Central District of California.

Edoco Technical Products, Inc., Plaintiff, vs. Peter Kiewit Sons' Co., Defendant, and The B. F. Goodrich Company, Intervening Defendant. No. 66-1497-JWC.

Filed: June 30, 1967.

After the argument upon the objections to the proposed findings, it became apparent that some memorandum of the court might be appropriate in order that the parties might fully understand the basis of my ruling upon the motion for summary judgment.

The Worson patent relates to a combination of elements well known in the arts. The file wrapper discloses that before the patent was finally allowed, a series of attempts were made to obtain the approval of claims of much broader scope than those finally allowed, some of which would undoubtedly have embraced the alleged infringing device. But these earlier claims were all rejected. It was only when the following limitation was added that the patent was allowed.

"The upper portion of band 12 tapers upwardly for a distance greater than the thickness of the band to provide a continuous upper straight edge while the lower portion of the band tapers downwardly at a distance greater than the thickness of the band to provide a continuous straight edge at the lower end of the band."

It would appear, therefore, that this limitation is an essential element of the claim, in fact the very element which the examiner thought made the claim patentable. Since the alleged infringing device does not come within this limitation, its obvious non-infringement leaves no substantial question of fact to be determined at the time of the trial.

Furthermore, as I construe claims 1 and 2 in the light of the file wrapper, the alleged infringing device does not come within the doctrine of equivalents. There are on file affidavits expressing contrary conclusions, but these do not in my opinion raise any real questions of fact.

The motion for summary judgment should, therefore, be granted, and the objections to the findings of fact and conclusions of law are hereby overruled.

Dated this 30 day of June, 1967.

Jesse W. Curtis
United States District Judge

Findings of Fact and Conclusions of Law.

[R 351]

In the United States District Court, Central District of California.

Edoco Technical Products, Inc., Plaintiff, vs. Peter Kiewit Sons' Co., Defendant, and The B. F. Goodrich Company, Intervening Defendant. Civil Action No. 66-1497 JWC.

FINDINGS OF FACT

1.

(a) This is an action for alleged infringement of United States Letters Patent No. 3,023,681, granted March 6, 1962, on an application of Lee Worson, for "Combined Weakened Plane Joint Former and Water-stop" (hereinafter referred to as "the Worson patent" or "the patent in suit") filed by plaintiff, Edoco Technical Products, Inc., initially against defendant, Peter Kiewit Sons' Co. The B. F. Goodrich Company made application to this Court for leave to intervene as a party defendant, which was granted by the Court, and unless referred to individually, the defendant, Peter Kiewit Sons' Co. and the defendant, The B. F. Goodrich Company are hereinafter referred to as "defendants."

(b) Defendants answered the complaint averring invalidity of the patent in suit, denying infringement, and charging plaintiff with unlawful misuse of the patent whereby plaintiff is estopped from maintaining the action. Defendants also filed counterclaims affirmatively seeking declaratory judgments in accordance with their answers to the complaint. Plaintiff replied to the counterclaims, admitting a controversy with

defendant Peter Kiewit Sons' Co., but denying a controversy with defendant The B. F. Goodrich Company, and admitting that B. F. Goodrich had not infringed. The latter admission, construed in the light of plaintiff's answers to defendants' interrogatories inconsistent with the admission, afford insufficient protection to defendant B. F. Goodrich because it leaves that defendant's customers open to suit for infringement, and does not remove the controversy.

(c) An actual controversy exists within the jurisdiction of this Court relative to the validity of Patent No. 3,023,681, the infringement thereof by the defendants, and the rights of the defendants thereunder.

2.

After the pleadings were closed and the plaintiff had filed answers to interrogatories propounded by defendant Kiewit, and answers to additional interrogatories filed by both defendants, the defendants brought the case on for final determination by a Motion for a Summary Judgment, praying for dismissal of the action, with prejudice, on the ground that the Court could determine as a matter of law that the patent in suit as to the claims sued on is invalid, and that defendants are not infringing the patent in suit, either directly or indirectly, and that defendant Goodrich has not contributorily infringed, or actively induced infringement, and that plaintiff has unlawfully misused the patent in suit and is therefore estopped to maintain this action.

3.

Jurisdiction of this Court was properly invoked upon the ground that the plaintiff's cause of action arises

under the patent laws of the United States, and the Court has jurisdiction of the subject matter of the action under the provisions of Judicial Code 28 U.S.C. § 1338, § 1400, including jurisdiction of defendants' counterclaims under 28 U.S.C. § 2201 and § 2202.

4.

Plaintiff, Edoco Technical Products, Inc., is a corporation organized and existing under the laws of the State of California, and has a place of business at 22039 South Westward Avenue, Long Beach, California 90810.

5.

(a) Defendant, Peter Kiewit Sons' Co., is a corporation organized and existing under the laws of the State of Nebraska; has a regular and established place of business at 301 East Santa Clara Street, Arcadia, California; and has appointed as its agent for service of process in the State of California, CT Corporation Systems, 510 South Spring Street, Los Angeles, California.

(b) Defendant, The B. F. Goodrich Company, is a corporation organized and existing under the laws of the State of New York, and has a regular and established place of business in the City of Los Angeles, County of Los Angeles, State of California.

6.

Acts of the defendants charged to infringe the patent in suit have been committed by the defendants within the former Southern District of California, and defendants have waived any question of venue which might arise from the realignment of judicial districts.

7.

This Court has jurisdiction of the parties.

8.

Plaintiff is the owner of the patent in suit. By answers to interrogatories it has expressly identified the subject matter of the alleged infringement, and by such answers has limited its charge of infringement to claims 1 and 2 of the patent in suit. The remaining claim, numbered 3, is not in issue and is not considered by this Court.

9.

There is no genuine issue of material fact before this Court on the question of non-infringement arising out of the motion for summary judgment, final disposition of the case can be predicated upon said motion, and all issues not decided upon said motion are moot and are disregarded.

10.

The patent in suit is directed to a paving section which may be concrete, wherein is embedded a fracturing band vertically disposed, and a waterstop horizontally disposed, the two parts being integrally connected together. The upper portion of the band tapers upwardly for a distance greater than the thickness in the central region of the band, and the lower portion of the band tapers downwardly for a distance greater than the thickness of the central region of the band. Opposite edges of the band are straight. Preferably, although not necessarily, the band and waterstop are formed of a resilient material, such as a synthetic plastic. The waterstop comprising the horizontal strips is serrated to define longitudinal ribs and is provided at its outer edges with enlarged anchor elements. The purpose of

the vertical strips is to separate the poured concrete along a predetermined relatively straight line for a portion, but not all, of the depth of the concrete, whereby when the concrete cures and contraction occurs, the concrete will tend to crack and separate in or near the vertical plane of the edges of the band. Subsequently, when expansion and contraction occurs, due to changes in temperature, the same lines provide for such, and indiscriminate cracking is minimized, if not prohibited. The waterstop which remains embedded in the concrete is to prevent water which seeps through the uppermost crack from making its way to the ground underneath the concrete.

The foregoing description relates to the form of structure illustrated in Figures 1-4 of the patent in suit and is allegedly protected by claims 1 and 2. A sample of plaintiff's fracturing band and waterstop (gray in color), responding to claims 1 and 2, is before the Court as Hearing Exhibit 1.

Inasmuch as plaintiff makes no contention that claim 3 is infringed, and such claim reads only on the form illustrated in Figures 5-8, such figures may be disregarded.

11.

Defendant, Peter Kiewit Sons' Co., has performed concrete lining operations in a section of what is known as the San Luis Canal in the general vicinity of Cantua Creek, in the County of Fresno, State of California, and is continuing in the performance of a contract for such work. Included in the construction of said concrete lining are weakened plane joints, sometimes called contraction joints, comprising polyvinyl chloride strips cruciform in cross section which are inserted in the con-

crete as it is laid, or soon thereafter, while the concrete is still soft; certain of such strips extend longitudinally of the canal, and other strips extend transversely thereof. The lines represented by these strips generally define approximately 15 ft. squares, although this dimension varies. Samples of the strips are before this Court as Interrogatory Exhibits. Exhibit A is a sample of blue material, and Exhibit B is a sample of white material. The blue material is laid longitudinally, and the white material is laid transversely. Interrogatory Exhibit C is a drawing in which Figure 1 illustrates the blue material in place in the concrete as laid and before curing. Figure 2 illustrates the same cross section of concrete as Figure 1 after the concrete has cured and contraction lines have appeared. Figure 3 is a fragmentary plan view of a portion of the concrete lining illustrating 15 ft. squares defined by the contraction lines. Insofar as this case is concerned, there is no distinction between the white and the blue material.

12.

The vertical elements of the strips described in Finding 11 are not tapered in either direction but embody flat, parallel outside surfaces. The horizontal water-stop element embodies no serrations, but merely enlarged beads along the outer edges.

13.

Defendant The B. F. Goodrich Company furnished the strip material described in Findings 11-12 to defendant Peter Kiewit Sons' Co. which the latter used in the canal construction, and B. F. Goodrich continues to furnish such material to Kiewit. In furnishing such material to Kiewit, B. F. Goodrich has at all times had

knowledge of its intended use by Kiewit, and of the manner in which Kiewit has used it in the canal construction. The material was especially made and especially adapted for such use by B. F. Goodrich.

14.

No activities of the defendants, or either of them, other than as described in Findings 11, 12 and 13, are charged by plaintiff to constitute infringement of the patent in suit.

15.

The file wrapper and contents of the patent in suit, and the references cited during the prosecution of the application for patent, are before the Court, being included in Book of Patents and File Wrapper In Support of Defendants' Motion for Summary Judgment, and have been considered by the Court.

16.

The application for the patent in suit as filed contained claims which were all sufficiently broad to embrace any generally cruciform configuration of the insert strip. No cross sectional taper of the vertical element was specified.

17.

The Patent Office rejected all original claims on prior art cited, Carter 2,508,443; Jacobson 2,619,884, and British 646,268 of 1950.

(a) The Carter patent illustrates an elastomeric joint for concrete pavements, the insert embodying a cruciform cross section.

(b) The Jacobson patent discloses an expansion joint employing inserts which have vertical ele-

ments and horizontal waterstops, around which concrete is poured.

(c) The British patent discloses a paving joint utilizing a thermoplastic strip material as a water-stop employed either horizontally or vertically. One form of the strip has a central tubular part. All forms embody ribs, corrugations or projections adapted to key with the concrete.

18.

In response to the rejection referred to in Finding 17, Worson filed an amendment cancelling one claim and amending others.

19.

In response to the amendment referred to in Finding 18, the Patent Office cited additional art, Jacobson 2,025,209 and Fischer 2,540,251, and again rejected the claims.

(a) Jacobson discloses an expansion and contraction joint for pavement, and the insert is tapered both upwardly and downwardly. However, it was cited merely to show a hollow core, as there were no claims in the application at that time defining a taper.

(b) Fischer shows another form of contraction joint for concrete pavements. He combines a vertical cleavage strip, having outer parallel surfaces and a horizontal waterstop in association with the vertical strip. Fischer's purpose is identical to that of Worson. [Col. 2, lines 7-23.] Fischer describes his invention as relating to "contraction joints embedded in concrete pavements as a means whereby cleavage of a section of pavement under in-

ternal stresses of contraction may be restricted to desirable geometrical lines and in rationally distributed vertical planes of subdivision, rather than along irregular lines, at random.” [Col. 1, lines 1-7.]

20.

In response to the rejection noted in Finding 19, Worson’s attorney interviewed the Examiner and then filed an amendment cancelling all the claims and substituting three new claims 13-15. None of these newly submitted claims specified any particular cross section for the vertical element. Worson’s attorney stressed the feature that the vertical bands or elements were defined as being of lesser height than the height of the paving section, and relied on this emphasis.

21.

The Patent Office then cited additional art, Heltzel 2,330,214, and Kelley 2,759,403, and rejected the claims. The Examiner pointed out that both Kelley and Heltzel show fracture bands embedded in a slab with the edges spaced from the upper and lower surfaces of the slab.

(a) Heltzel discloses a joint in concrete pavement, and describes the fracturing of the pavement as a result of its use.

(b) Kelley illustrates a joint in which the fracturing element is cruciform in cross section and opposite surfaces of the elements are parallel.

22.

Worson’s attorney responded to the rejection set forth in Finding 21 by asking for reconsideration, and submitted an extensive written argument urging that the

claims were allowable. Such paper was filed in the Patent Office January 4, 1961. Between that date and April 12, 1961, and prior to a further Office Action, Worson's attorney again interviewed the Examiner, and thereupon filed a supplemental amendment April 14, 1961. This amendment cancelled claims 13-15, and substituted claims 16, 17 and 18, which latter claims are claims 1, 2 and 3 of the patent in suit.

23.

The limitations included in the final set of claims, 16-18, which rendered such claims allowable in the opinion of the Examiner, included the requirement for the first time that the vertically extending paving fracturing band have "its upper portion tapering upwardly for a distance greater than the thickness of said band * * *" and "said band having its lower portion tapering downwardly for a distance greater than the thickness of said band * * *."

24.

(a) In support of the final set of claims, the attorney appended remarks (file wrapper pages 50-51), which included the following language:

"The courtesy of the Examiner at the recent interview is hereby acknowledged.

"At this interview, the desirability of revising the form of the claims so as to patentably distinguish over the prior art was discussed. In accordance with this discussion, claims 13, 14 and 15 have been cancelled and new claims 16, 17 and 18 substituted therefor.

"The new claims specifically recite the applicant's paving fracturing band as having an upper

portion tapering upwardly for a distance greater than the thickness of the band to provide a continuous straight edge below the upper surface of the paving section. Similarly, the lower portion of the band is recited as tapering downwardly for a distance greater than the thickness of the band to provide a continuous straight edge disposed above the lower surface of the paving section. Because of this configuration, the paving section undergoes fracturing in vertical alignment with the upper and lower edges of the band as the paving cures so as to define a weakened plane joint across the paving section.”

(b) Further, in order to support these claims, and after another discussion with the Examiner, Worson inserted in the specification the following language (file wrapper page 58):

“The upper portion of band 12 tapers upwardly for a distance greater than the thickness of the band to provide a continuous upper straight edge while the lower portion of the band tapers downwardly for a distance greater than the thickness of the band to provide a continuous straight edge at the lower end of the band.”

This insert is found in the patent at Column 2, lines 43-49.

25.

In view of this prosecution outlined in Findings 16-24, the patentee has excluded himself from asserting that the use of a fracturing band which is not tapered falls within the scope of his claims. A band which has parallel surfaces is not tapered. No doctrine of equivalents enables him to contend otherwise.

26.

It appears from the appropriate exhibits and description that defendants' structures do not include any band having either its upper portion tapering upwardly or its lower portion tapering downwardly. Consequently, defendants' structures are outside the scope of plaintiff's claims and do not infringe either claim 1 or claim 2.

27.

The claims in suit also call for horizontally extending sealing strips "each being formed with longitudinally extending serration means that are firmly embedded within said paving as said paving cures." The specification states that the sealing strips "are serrated to define longitudinal ribs 19 and are formed at their free ends with an enlarged anchor element 20." [Patent Col. 2, lines 55-57.] The serrations and the anchor elements are independent and separate. [Patent Col. 2, paragraph beginning line 68.] While the serrations are included as claim elements in the patent, the enlarged anchor elements are not mentioned in the claims.

28.

The longitudinally extending serrations were included in original application claims 3, 4, 7, 8 and 12, but no enlarged anchor means. Original claims 6 and 10 included enlarged anchor means but no serrations. Original claim 11 contained both "longitudinally extending serrations" and "enlarged anchor means."

29.

These claims, referred to in Finding 28, were all rejected. In due time they were cancelled, and claims 13-15 substituted. The substituted claims included

“longitudinal serration means” but no enlarged anchor means. The claims were rejected.

30.

In the attorney’s response to the Patent Office, file wrapper 42 et seq., he argued at page 43:

“Assuming, however, that the Kelley device were formed of the resilient material of the British patent, the resulting device would not meet the limitations of the applicant’s claimed combination nor would it be workable. The applicant’s horizontally extending sealing strips are recited as being formed with longitudinally extending serration means. It is absolutely essential that such serration means be provided in order to lock the applicant’s strips to the adjoining paving slabs 60 and 62. Unless these sealing strips are so locked to the adjoining paving slabs, they cannot function as a waterstop, particularly, when the adjoining paving slabs undergo horizontal separation, as indicated in Fig. 4 of the applicant’s drawings.”

These “absolutely essential” longitudinally extending serration means that are firmly embedded within the paving as the paving cures were carried over into claims 16-18 which became claims 1-3 of the patent.

31.

Worson’s attorney further emphasized the importance of these serration means in his argument, file wrapper page 51 in the following language:

“The new claims also recite the applicant’s integral horizontally extending sealing strips 14 and 16 as being formed with longitudinally extending serration means that are firmly embedded within the

paving as the latter cures. This arrangement insures that the sealing strips will restrain the downward flow of water through the joint while relative movement is permitted by the paving sections on either side of the weakened plane joint.”

Nothing was said concerning the enlarged anchor means. They are the marginal enlargements 20. They are not included as elements of the combination claimed in the patent claims.

32.

In view of this prosecution outlined in Findings 28-31, the patentee has excluded himself from asserting that the use of sealing strips which omit longitudinally extending serration means falls within the scope of his claims.

33.

It appears from the appropriate exhibits and description that defendants’ structures do not include any sealing strips which embody longitudinally extending serrations. Consequently, defendants’ structures are outside the scope of plaintiff’s claims, and for such additional reasons do not infringe either claim 1 or claim 2.

34.

Insofar as the affidavits of Francis A. Utecht and Lee Worson filed in opposition to defendants’ motion for summary judgment may appear to conflict with any of the foregoing findings dealing with the file wrapper history, and non-infringement, such affidavits cannot be used to contradict the contents of the file history nor to change the patentee’s position taken therein and therefore present no genuine issues of material facts.

35.

Defendant The B. F. Goodrich Company has the facilities to and does manufacture, and is endeavoring to sell to various contractors other than defendant Kiewit, plastic strip material identical to that sold to Kiewit and for use in paving constructions identical to those charged by plaintiff to be an infringement of the patent in suit. [Uncontradicted Affidavit of William A. Shira, Jr., In Reply to Plaintiff's Opposition to Motion By The B. F. Goodrich Company to Intervene.]

36.

There is a justiciable controversy between plaintiff and defendant B. F. Goodrich properly before this Court, and any uncertainties as to plaintiff's intentions should be resolved by adjudication as to the rights of B. F. Goodrich and its customers and to avoid multiple litigation.

37.

Manufacture by or for the defendant The B. F. Goodrich Company of the insert material exemplified by Interrogatory Exhibits A, B and C, and sale of the same to defendant Peter Kiewit Sons' Co., or any other person, firm or corporation, for utilization in the same manner and for the same construction as utilized by defendant Kiewit, as described in Finding 11 and in the Preface to Interrogatory No. 1, or in any other manner, does not constitute either direct or contributory infringement, or the active inducement of infringement, and defendant B. F. Goodrich and any and all of its customers purchasing such insert material and using it should be held free of any charge of infringement of the patent in suit.

38.

Any conclusion of law hereinafter recited which which should be a finding of fact is hereby adopted as such.

CONCLUSIONS OF LAW

I

This Court has jurisdiction of the cause of action averred in the complaint and the causes of action averred in the counterclaims, and has jurisdiction of the parties.

II

U. S. Letters Patent No. 3,023,681, granted March 6, 1962, for "Combined Weakened Plane Joint Former and Waterstop" is owned by plaintiff, Edoco Technical Products, Inc.

III

Claims 1 and 2 of said Letters Patent were so limited as a result of amendments, admissions and arguments made by the patentee during the prosecution of the application in the United States Patent Office which matured into said Letters Patent, and as required by prior art cited by the Patent Office during said prosecution, that they cannot be construed with sufficient breadth or scope to comprehend any activities of the defendants, or products or structures manufactured or used or sold by said defendants, and consequently, the defendants have not infringed said Letters Patent.

IV

The manufacture and sale by defendant The B. F. Goodrich Company of the plastic insert strips utilized by defendant Peter Kiewit Sons' Co., as set forth in the

Findings of Fact, does not constitute direct or contributory infringement or inducement of infringement of said Letters Patent, and no use of said strip material by any customer of said defendant The B. F. Goodrich Company can constitute infringement of said Letters Patent.

V

Inasmuch as the remaining claim 3 of said Letters Patent No. 3,023,681 was not charged to be infringed, the Court finds it unnecessary to make any conclusion with respect to either the validity or infringement thereof.

VI

Inasmuch as the Court has determined that there are no genuine issues of material fact with respect to the question of non-infringement, and the Court can make final disposition of the case by a decision of non-infringement, summary judgment is called for, and all other issues tendered are thereby moot.

VII

The complaint should be dismissed on the merits and with prejudice to the plaintiff, the counterclaims should be sustained on the ground of non-infringement, and costs should be awarded in favor of defendants.

VIII

Any finding of fact which should be a conclusion of law is hereby adopted as such.

Dated at Los Angeles, California June 30, 1967.

/s/ Jesse W. Curtis

Judge, United States District Court

Presented By: Huebner & Worrel, Herbert A. Huebner, Harlan P. Huebner, Albert L. Gabriel. By /s/ Herbert A. Huebner, Herbert A. Huebner, /s/ Harlan P. Huebner, Harlan P. Huebner, Attorneys for Defendants. William A. Shira, Jr. Of Counsel.

Approved as to Form: Fulwider, Patton, Rieber, Lee & Utecht, By _____, Attorneys for Plaintiff.

Summary Judgment.

[R 369]

In the United States District Court, Central District of California.

Edoco Technical Products, Inc., Plaintiff, vs. Peter Kiewit Sons' Co., Defendant, and The B. F. Goodrich Company, Intervening Defendant. Civil Action No. 66-1497 JWC.

This cause having come on for hearing on motion for summary judgment filed by defendant Peter Kiewit Sons' Co., and intervening defendant The B. F. Goodrich Company, the showing of plaintiff and defendants having been considered, oral argument having been presented, the Court being advised in the premises, and the Court having determined that there is no genuine issue of material fact on the question of non-infringement and that the defendants are entitled to a judgment of law in accordance with the Findings of Fact and Conclusions of Law, and the Court having ordered that defendants' motion for summary judgment be granted,

IT IS THEREFORE ADJUDGED AND DECREED:

That the complaint and the action is hereby dismissed on the merits with prejudice and that plaintiff take nothing thereby, that the counterclaims of the respective defendants for declaratory judgments be sustained on the ground of non-infringement, and that defendants recover of plaintiff costs in the sum of \$189.90.

There is no just reason for delay in the entry of a final judgment as to the claim for patent infringement made in the complaint of plaintiff, and the claims for relief on the ground of non-infringement made in the counterclaims of defendants, and the Court expressly directs the entry of final judgment accordingly.

Dated at Los Angeles, California, June 30, 1967.

/s/ Jesse W. Curtis

Judge, United States District Court

Presented By: Huebner & Worrel, Herbert A. Huebner, Harlan P. Huebner, Albert L. Gabriel. By /s/ Herbert A. Huebner, Herbert A. Huebner, /s/ Harlan P. Huebner, Harlan P. Huebner, Attorneys for Defendants. William A. Shira, Jr., Of Counsel.

Approved as to Form: Fulwider, Patton, Rieber, Lee & Utecht, By Francis O. Utecht, Attorneys for Plaintiff.

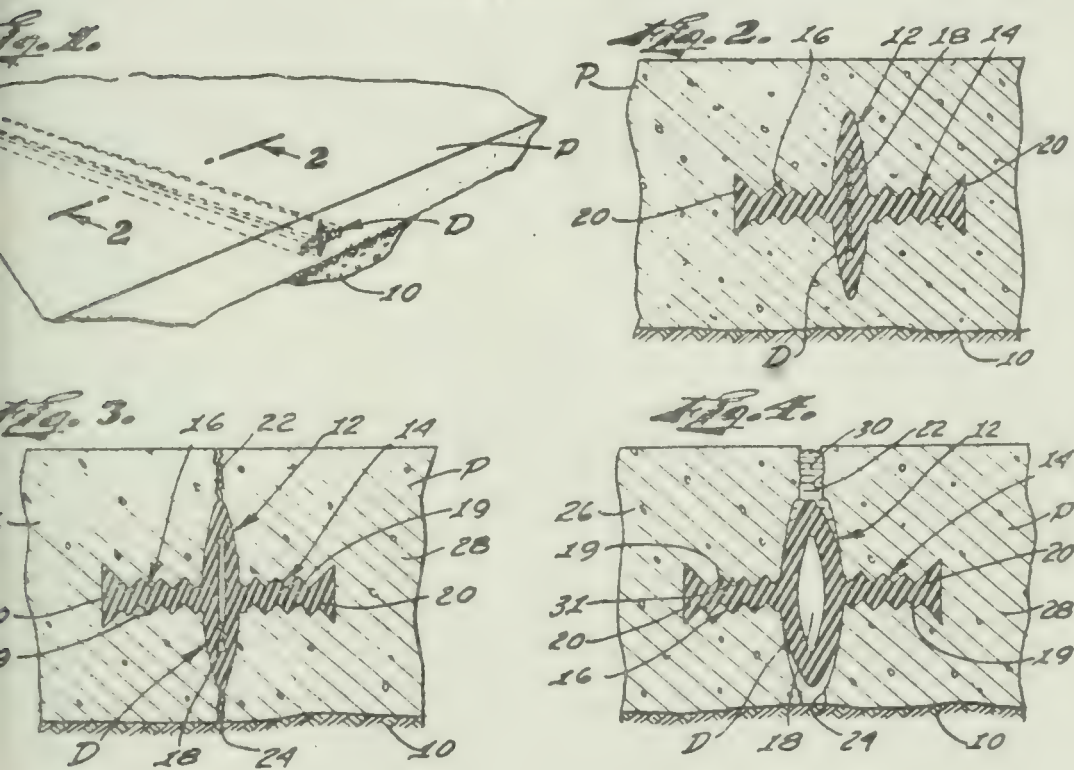
March 6, 1962

L. WORSON

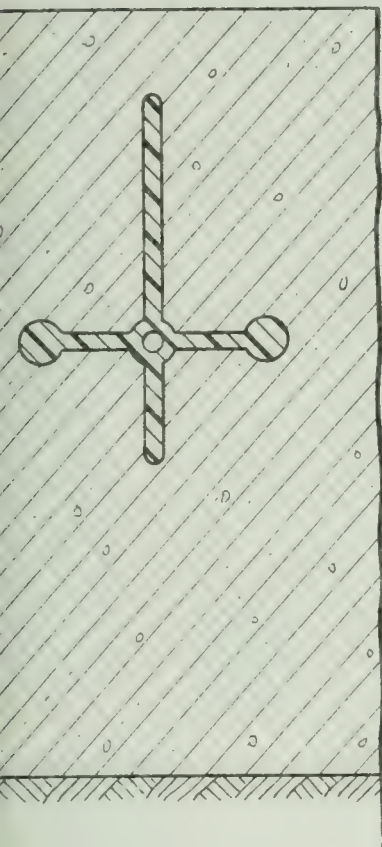
3,023,681

COMBINED WEAKENED PLANE JOINT FORMER AND WATERSTOP

Filed April 21, 1958



RETE BEFORE CURING



CONCRETE AFTER CURING

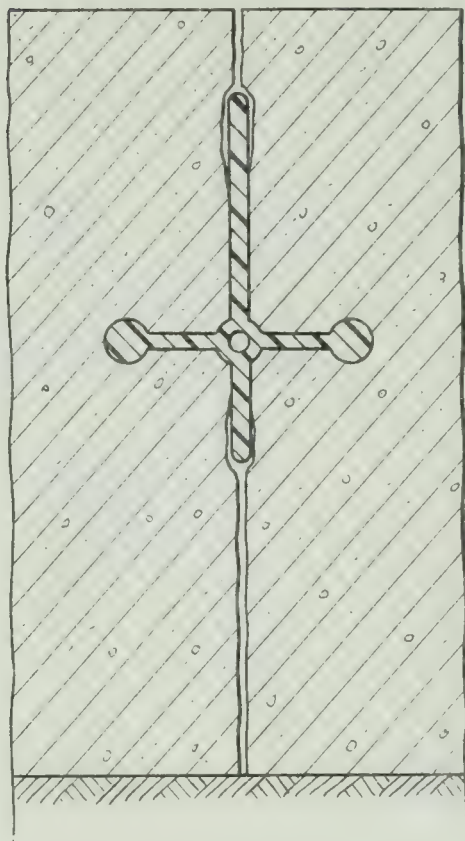


FIG. 3

FRAGMENTARY PLAN VIEW OF CONCRETE LINING
ILLUSTRATING 15' SQUARES DIFINED BY CONTRACTION LINES

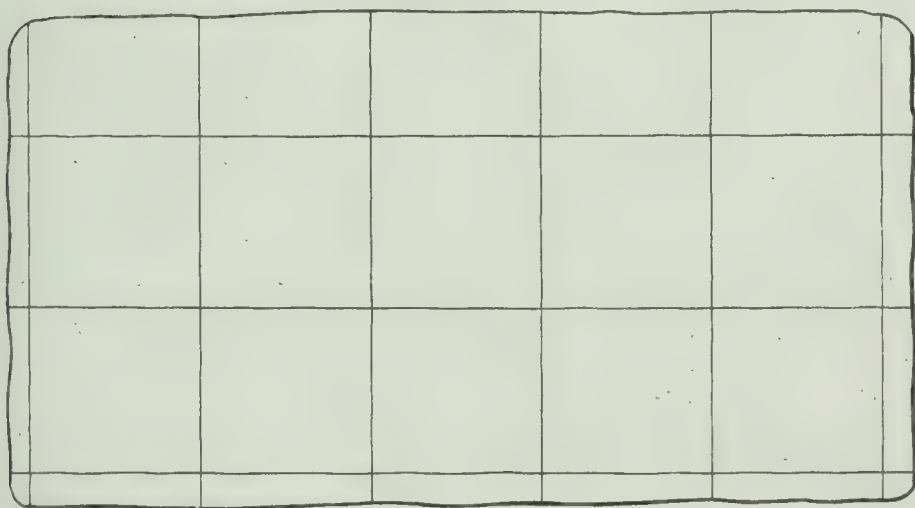


EXHIBIT C

No. 22208

IN THE
United States Court of Appeals
for the Ninth Circuit

EDOCO TECHNICAL PRODUCTS, INC.,
Plaintiff-Appellant,

VS.

PETER KIEWIT SONS' CO., and
THE B. F. GOODRICH COMPANY,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S REPLY BRIEF

FULWIDER, PATTON, RIEBER, LEE & UTECHT
FRANCIS A. UTECHT
820 Edison Building
100 Long Beach Boulevard
Long Beach, California 90802
Attorneys for Plaintiff-Appellant

LONG BEACH REPORTER

FILED

APR 9 1968

TOPICAL INDEX

	Page
Defendants-Appellees' Arguments Are Fallacious In The Following Respects	
A. Re Defendants' Argument That The District Court's Non-Compliance With Local Rule 4 Should Not Have Been Grounds For Reversal.	1
B. Re Defendant's Argument That A File Wrapper Es- toppel Was Clearly Established.	
1. The tapering language	3
2. As to the serration means	5
C. Re Defendants' Argument That The Worson Invention Is A Narrow One In A Crowded Art.	6
D. Since A File Wrapper Estoppel Does Not Exist, The Doctrine Of Equivalents Applies And There Is No Question But That Defendants Infringe.	8
E. Re Defendants' Invitation To This Court To Find The Patent Invalid.	9
F. Re Defendants' Contention That A Case For Summary Judgment Was Fully Established.	12

TABLE OF AUTHORITIES CITED

Cases

	Page
International Manufacturing Co. v. Landon, 336 F.2d 723 (August 1964)	5, 6
Kwikset Locks v. Hillgren, 210 F.2d 483, cert. den. 347 U.S. 989, 98 L. Ed. 1123	12, 13
Neff Instrument Corp. v. Cohu Electronics, Inc., 269 F.2d 668 (August 1959)	14
Nelson v. Batson, 322 F.2d 132 (August 1963)	9
Oxnard Cannery v. Bradley, 194 F.2d 655, cert. den. 343 U.S. 978, 96 L. Ed. 1370	12, 13
Rohr Aircraft Corp. v. Rubber Teck, 266 F.2d 613, 121 U.S.P.Q. 241	12, 13
Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 74 L. Ed. 147	12, 13

IN THE
**United States Court of Appeals
for the Ninth Circuit**

No. 22208

EDOCO TECHNICAL PRODUCTS, INC.,
Plaintiff-Appellant,

vs.

PETER KIEWIT SONS' CO., and
THE B. F. GOODRICH COMPANY,
Defendants-Appellees.

PLAINTIFF-APPELLANT'S REPLY BRIEF

**DEFENDANTS-APPELLEES' ARGUMENTS ARE
FALLACIOUS IN THE FOLLOWING RESPECTS**

**A. Re Defendants' Argument That The District Court's
Non-Compliance With Local Rule 4 Should Not Have Been
Grounds For Reversal.**

Plaintiff-Appellant's first ground of argument set forth at Page 20 of its opening brief is that the District Court's non-compliance with Local Rule 4(g) was per se grounds for reversal. Defendants' opposition to this argument appears at Page 25 of their Brief under the heading "Appellants' Day in Court on Findings 27-33."

It should first be noted that subsequent to the time of the hearing on the Motion for Summary Judgment, the Local Rules for the Central District were revised and apparently renumbered, whereby former Local Rule 4(g) became present Rule 3(g). The text of such rule remained identical, however.

Defendants argue that plaintiff's attack upon Findings 27-33 and the procedural steps culminating in their adoption and filing is based upon a misconception since Rule 52(a) F.R.C.P. provides that findings are unnecessary on decisions for a Motion for Summary Judgment. The fallacy of defendants' argument will be clearly evident to this Court. Admittedly, findings need not be made for a Motion for Summary Judgment. Such fact, however, does not afford an excuse for non-compliance with Local Rule 3(g) since such Local Rule is not contrary to the F.R.C.P.

Defendants' contention on Page 26 of their Brief that the provisions of the Local Rule "seems to be mainly for the purpose of focusing the points in controversy" is likewise fallacious. The only logical reason for requiring the moving party to set forth its proposed findings and conclusions is to permit the opposing party to bring before the District Court and thus enter into the record all evidence justifying opposer's position. The present case provides a perfect example of the reason for this rule. Thus, it will be noted that defendants' Brief devotes Pages 20-25 to arguments that the alleged file wrapper estoppel precludes construing defendants' waterstop enlargements as being the equivalent of the serration means

of the patent claims. Such arguments are based upon Findings 27-33. Plaintiff was precluded from introducing affidavits or other evidence controverting these arguments in connection with the Motion for Summary Judgment *simply and solely because plaintiff had not been provided with notice that findings of this nature would be relied upon by the District Court as partially justifying its ruling on the Motion.*

With regard to defendants' contention that the serration means appear in the record in connection with the Motion for Summary Judgment, it should be noted that such references were only incidental to the issue of infringement. Thus, at R 173 the reference is merely a general description of appellant's waterstop; at R 188 and R 221 the reference is to a description of appellees' waterstop; the Worson affidavit at R 257 merely recites the functional equivalency of plaintiff's and defendants' waterstops; the arguments presented in open court June 5, 1967 were *solely arguments on the part of defendants' attorney and prior to the hearing plaintiff's attorney was not even aware such arguments were going to be made.*

Accordingly, plaintiff was in fact deprived of its day in Court with respect to Findings 27-33 by the District Court's failure to comply with the Local Rule.

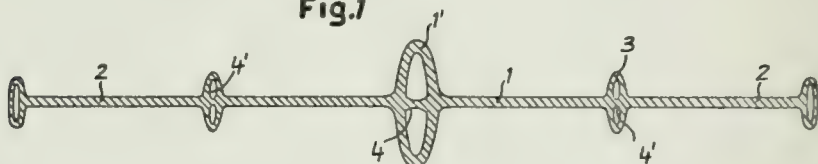
B. Re Defendants' Argument That A File Wrapper Estoppel Was Clearly Established.

1. The tapering language.

Appellees' argue that plaintiff is precluded from asserting defendants' straight-sided vertical band falls within the scope of patent Claims 1 and 2 because such

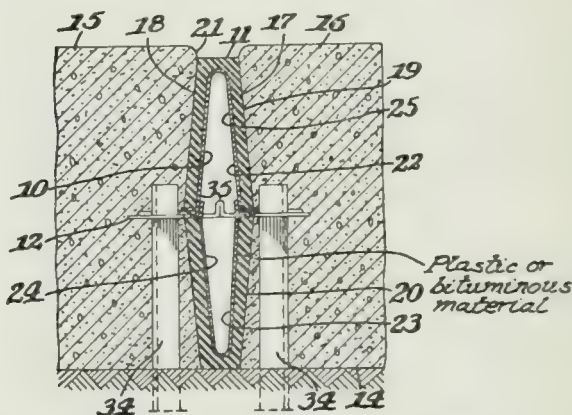
tapering language was added to the claims to overcome a rejection on the prior art. Appellees' argument, however, conveniently overlooks the fact that at the time of the rejection tapered bands were old in the art, as represented for example by Wey Patent No. 2,901,904 and Jacobson Patent No. 2,025,209. These patents appear as Exhibits D and M to the Book of Patents filed in support of Defendants' Motion for Summary Judgment. In view of the importance of this point, Figs. 1 and 2, respectively, of these two patents appear immediately herebelow:

Fig. 1



Wey Patent No. 2,901,904

Fig. 2.



Jacobson Patent No. 2,025,209

Referring first to the Wey patent, there is shown a synthetic plastic packing strip to be interposed between joints in cement. The strip includes horizontal arms 2 that extend outwardly from the opposite

sides of a vertical element 4. The vertical element 4 is seen to taper upwardly and downwardly from its midportion.

Jacobson discloses an expansion and contraction joint interposed between adjoining lengths of concrete roadway. The Jacobson joint includes a vertically extending band 10 which tapers upwardly and downwardly from its midsection to terminate in upper and lower horizontal edges 11. Jacobson was cited by the Patent Examiner during the prosecution of the patent in suit and accordingly such Examiner knew full well it was old to provide a tapered vertical band in concrete roadway joints.

Since the use of a vertically tapered band in a concrete roadway joint was old in the art, the present case is on all fours with the *International Manufacturing Co. v. Landon* case appearing at Page 21 of Plaintiff-Appellant's Opening Brief. Accordingly, there is no reason why this Court should not reach the same conclusion in this case as it reached in the *International* case.

This case and the *International* case differ factually from the cases cited in defendants' Brief. In the cases cited by defendants there is no indication that the limitations added to the questioned claims to effect the allowance of such claims were old in the prior art.

2. As to the serration means.

As noted previously herein, the District Court made Findings 27-33 without complying with the then Local Rule 4(g). Accordingly, plaintiff had no opportunity to introduce evidence controverting such findings as

they pertained to the alleged file wrapper estoppel in connection with the serration means element of the patent claims. Fortunately, however, the record does include prior art showing serration means to be old in the art at the time the patent in suit was prosecuted. Thus, Fig. 2 of British Patent No. 646,268 appears as Exhibit L in the Book of Patents filed with the Motion for Summary Judgment. A copy of Fig. 2 of the British patent appears at Page 33 of Plaintiff-Appellant's Opening Brief.

Referring to such drawing, there is shown a synthetic plastic joint interposed between the adjacent concrete blocks. The joint includes a tubular central portion 5 from the opposite sides of which extend horizontal wings formed with longitudinal serrations 7. This British patent was likewise before the Patent Examiner during the prosecution of the patent in suit. Thus, in accordance with the doctrine expressed in the *International* case, the recitation of the serration means could not be the heart of the invention, since such serration means were old in the art at that time. It is accordingly not true as contended by defendants that the doctrine of equivalents cannot be applied to the serration means element so as to preclude plaintiff from construing Claims 1 and 2 broadly enough to read on defendants' waterstop-forming enlarged beads.

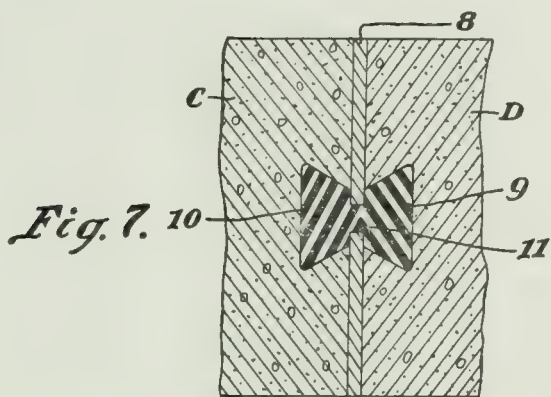
C. Re Defendants' Argument That The Worson Invention Is A Narrow One In A Crowded Art.

Defendants contend at Page 16 of their Brief that the Worson invention is narrow rather than of a

pioneering nature because Fischer Patent No. 2,540,251 illustrates and describes exactly what was new and patented by Worson.

This contention is at complete odds with the actual facts.

To clearly demonstrate the fallacious nature of defendants' statement, there appears herebelow a copy of Fig. 7 of the Fischer patent:



Fischer Patent No. 2,540,251

Referring to the above drawing, there is shown one of several forms of contraction joints for a concrete pavement. It is important to note that Fischer did not contemplate continuous paving of a concrete roadway, but instead discloses "two adjacently poured concrete slabs" (Column 1, line 36). The oppositely directed cross-hatching of the adjacently poured concrete slabs C and D in Fig. 7 also make it clear that Fischer did not contemplate continuous paving. It is uncontested that in pouring an elongated concrete structure continuous paving is absolutely essential. As pointed out at Page 4 of the Plaintiff-Appellant's

Opening Brief, it was the Worson invention which made it practical to utilize continuous paving.

Next, it will be noted that Fischer's band does not effect fracturing of the concrete above and below its upper and lower edges as with Worson's invention. Fischer does not disclose a fracturing band at all, but rather he discloses a "cleavage-defining" band. In Fischer, upon contraction of the two adjacently poured concrete slabs, one slab pulls away from the other along the vertical plane defined by Fischer's band. Thus, it will be apparent that Fischer does not even disclose a "weakened plane joint," but instead merely discloses the now-discarded "contraction joint." How then can defendants conscientiously contend Fischer illustrates and describes the Worson invention?

If any further argument is required to establish that Fischer fails to disclose what was new and what was patented by Worson, it need only be pointed out that *defendants did not copy Fischer's "contraction" joint, but instead copied plaintiff's "weakened plane joint."*

D. Since A File Wrapper Estoppel Does Not Exist, The Doctrine Of Equivalents Applies And There Is No Question But That Defendants Infringe.

Defendants do not even contest the fact that defendants' structure performs substantially the same function in substantially the same way to obtain the same result as the patented combination. As noted in Plaintiff-Appellant's Opening Brief, the evidence before the District Court clearly established such equivalency. Thus, in accordance with the doctrine of

equivalents as expressed by this Court in *Nelson v. Batson* appearing at Page 24 of Plaintiff-Appellant's Opening Brief, Claims 1 and 2 are clearly infringed.

E. Re Defendants' Invitation To This Court To Find The Patent Invalid.

Defendants' Brief includes an invitation to this Court to find the patent in suit invalid even though the District Court held that:

“As to the question of validity and misuse of the patent, no determination can be made upon a Motion for Summary Judgment as material questions of fact still remain to be resolved.” (Record 329)

Defendants' argument for invalidity is that the German Gebrauschmuster 1,756,880 discloses a fracturing band similar to the fracturing band of the claimed combination and that to utilize such German band in wet concrete would be obvious in the light of several other patents. The fallacy of such contention is firmly established by the following statement from the Worson Affidavit:

“a) German Petty Patent No. 1,756,880 does not show the combination of a paving section formed with a weakened plane joint by means of of a resilient band having upper and lower portions, the top and bottom edges of which define straight edges disposed below the top surface of the paving section and above the lower surface of the paving section, such strip being formed with horizontally extending sealing strips that define waterstops when the paving cures, and such sealing strips also permitting relative move-

ment between the portions of the paving section on either side of the weakened plane joint. Instead, the German Petty Patent refers to joints in overlays made of plaster, insulation or floor covering compositions. These overlaps are placed on top of solid concrete floors or roofs in buildings. As is well known, one of the first operations in construction of buildings with concrete floors and roofs is to pour the concrete. One of the last operations will be to apply the plaster or other type of floor covering because of the likelihood of scratching or gouging of such covering during subsequent work on the building. Overlays are never laid at the same time when concrete slab is placed. In buildings there is not as much temperature changes as on paving slabs where sun heats the slab and provokes movement of the slab so that in buildings the temperature is much more even. Therefore, there is no need of large expansion joints in the concrete and a weakened plane joint can be used at greater intervals than on highways. Plaster floor coverings cannot use weakened plane joints because of appearance requirements and instead use expansion joints. Such expansion joints have to be scrupulously placed in the same vertical plane as the weakened plane joints of the concrete. Otherwise, the concrete joint will crack the finish covering above and form unacceptable random cracks. The German patent accomplished exact presetting of the plaster expansion points by forming the weakened plane slot in the concrete slab 16 and later anchoring the bottom fin 10 of the plastic strip in the existing void in the concrete. This plastic strip comes flush to the top of the overlay thus forming a neat, straight, finished line in the upper surface of the plaster

9. This sequence of operations is shown by the three diagrams appearing across the top of Exhibit A, such diagrams being designated Drawing No. C.

To form the slot in the concrete slab 16, a conventional saw cut such as shown at No. 3 of Exhibit A could be used, or an insert left in such as shown at No. 2 of Exhibit A. Probably, this insert will be most practical because during the construction period after the concrete is poured but before the plaster overlay is poured dirt and dust will accumulate in these slots and it would not be easy to clean them. The insert will be removed just before placing the plastic. It certainly would not be practical to leave the German plastic strip imbedded in the concrete slab 16 until such time as the plaster covering 9 is poured because it would be difficult if not impossible to finish the concrete slab around this strip. Also, such strip would seriously interfere with all construction activities on the slab during the construction of the rest of the building. Accordingly, it will be clear that the German patent contains not even the slightest suggestion that the plastic strip could be used to form a weakened plane joint in a concrete canal lining or the like." (Record 252-254)

From the above language it will be clear that the German Petty Patent fails to provide any suggestion whatsoever that the strip shown therein could have been utilized in the weakened plane joint claimed in the patent in suit. With particular regard to the lack of obviousness of utilizing the German strip in a continuously paved concrete joint, the following language from the Worson Affidavit is completely

dispositive:

“That defendants’ Motion For Summary Judgment asserts I did not make a valid invention because my patented joint would have been obvious. Such obviousness is refuted by the fact that after I introduced my invention the most experienced concrete experts in the United States did not believe it would work and it took me several years of hard work to change their minds. The objections they presented were serious ones and could be refuted only by field experience which was very difficult to obtain and required great financial sacrifices.” (Record 256)

The record before this Court indicates the invention of the patent in suit was most unobvious. Accordingly, there is no justification for defendants’ suggestion that this Court hold such patent invalid.

F. Re Defendants’ Contention That A Case For Summary Judgment Was Fully Established.

Plaintiff-Appellant’s Opening Brief final argument is that the District Court erred in finding there was no issue of material fact on the question of non-infringement. Defendants’ opposing argument begins on Page 28 of their Brief. Defendants’ argument relies primarily upon a quotation from *Sanitary Refrigerator Co. v. Winters* and a statement that this Court is in accord with the quoted language in view of the *Kwikset*, *Oxnard Cannery* and *Rohr Aircraft* decisions.

Defendants’ reliance upon these four cases as justification for the decision of the District Court in this case is completely inapropos.

Neither the *Sanitary Refrigerator* nor the three cited Ninth Circuit cases dealt with a Motion for Summary Judgment. Instead, these cases each involved a trial, with the evidence coming before the appellate tribunal being undisputed. Thus, the Supreme Court in the *Sanitary Refrigerator Co.* case carefully pointed out that it could resolve the question of patent infringement as a matter of law because there was no disputed evidence before it. In *Kwikset*, this Court pointed out that “there is no dispute as to the evidentiary facts.” In the *Oxnard Cannery* case this Court held “it appears that no substantial dispute of facts is presented.” Defendants’ reliance upon the *Rohr Aircraft* case is not understood by plaintiff since in *Rohr* this Court disposed of the case by holding the patent invalid and infringement was not even considered.

It will therefore be clear that this case differs completely from the cases relied upon by defendants. In this case, as noted at Page 34 of Plaintiff-Appellant’s Opening Brief, the Utecht Affidavit presented a disputed issue of fact as to the reason the “tapering” language was added to the patent claims. Defendants’ contend the tapering language was added solely to overcome the prior art rejection whereby a file wrapper estoppel resulted. Plaintiff contends that such tapering language was added in conjunction with other functional language to better distinguish the principle of the entire combination over British Patent No. 646,268. The undisputed facts established by the file history of the patent in suit and the prior art could lead to a conclusion that either plaintiff’s ver-

sion of such disputed fact is correct or conversely defendant's version of such disputed fact is correct.

The District Court elected to resolve this disputed evidence in favor of defendants. Accordingly, the District Court acted directly contrary to the direction of this Court set forth in *Neff Instrument Corp. v. Cohu Electronics, Inc.*, 269 F.2d 668 (August 1959):

“On a motion for summary judgment the burden of establishing the non-existence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, * * * On appeal from an order granting defendants' motion for summary judgment the Circuit Court of Appeals must give the plaintiff the benefit of every doubt.”

If this Court gives the plaintiff herein the benefit of doubt, this case will be remanded to the District Court for trial.

Respectfully submitted,

FULWIDER, PATTON, RIEBER,
LEE & UTECHT

Francis A. Utecht

Attorneys for Plaintiff-Appellant

CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

Francis A. Utecht

NO. 22209 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERICH K. W. RENNER,

Appellant,

vs.

IMMIGRATION & NATURALIZATION
SERVICE,

Appellee.

FILED

MAR 11 1968

WM. B. LUCK, CLERK

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

EDWARD RAIDEN

257 South Spring Street
Los Angeles, California 90012

Attorney for Appellant

MAR 11 1968

N O. 2 2 2 0 9

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERICH K. W. RENNER,

Appellant,

vs.

IMMIGRATION & NATURALIZATION
SERVICE,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

EDWARD RAIDEN

257 South Spring Street
Los Angeles, California 90012

Attorney for Appellant

TOPICAL INDEX

	<u>Page</u>
Table of Authorities	iii
JURISDICTION	1
STATEMENT OF THE CASE	2
FACTS	6
QUESTIONS PRESENTED	16
SUMMARY OF ARGUMENT	18
ARGUMENT	21
I THE FINDINGS OF THE COURT DO NOT SUPPORT REJECTION OF NATURALIZATION.	21
II THE EVIDENCE DOES NOT SUPPORT THE FINDINGS.	25
III THE POWER TO DECLARE WHO MAY BECOME CITIZENS RESTS WITH CONGRESS AND NEITHER THE COURTS NOR ANY ADMINISTRATIVE AGENCY MAY EXTEND OR RESTRICT THE REQUIREMENTS ESTABLISHED BY CONGRESS.	33
IV IT WAS A FAILURE OF DUE PROCESS FOR THE EXAMINER TO TAKE THE TESTIMONY OF WITNESSES IN OPPOSITION TO NATURAL- IZATION WITHOUT TAKING THE TESTIMONY OF PETITIONER AND HIS WITNESSES.	34
V THERE WAS A FAILURE OF DUE PROCESS WHEN A NECESSARY STEP IN THE ADMIN- ISTRATIVE-JUDICIAL PROCESS WAS LEFT OUT.	35
VI IT WAS ERROR TO ADMIT THE RECORD OF THE EXAMINER'S HEARINGS, ESPECIALLY SINCE IT INCLUDED THE HEARSAY LETTER.	40
VII CONGRESS INTENDED THAT THE EXAMINER NOT ACT AS A PARTISAN IN THE COURT HEARING WHICH IN EFFECT REVIEWS HIS DECISION.	40

	<u>Page</u>
VIII IS PETITIONER TO BE TESTED BY EVERY PERSON TO WHOM HE TALKED; AND IS WHAT HE IS PURPORTED TO HAVE SAID ABSOLUTE AND BINDING?	41
CONCLUSION	43
CERTIFICATE	44
APPENDIX	A-1

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Busey v. Deshler Hotel Co., 130 F.2d 187, 142 A.L.R. 563	39
Cohnstaedt v. I. & N. S., 339 U.S. 901, 70 S.Ct. 516	43
Federal Maritime Bd. v. United States, 72 S.Ct. 623, 342 U.S. 950, 96 L.Ed. 706	35
Ex Parte Fillibertie, 62 F.Supp. 744	34
Giruoard v. United States, 328 U.S. 61, 66 S.Ct. 826	34, 43
Isbrandtsen Co. v. United States, 96 F.Supp. 883, affirmed A/S J. Ludwig Mowinckels Rideri v. Isbrandtsen Co., 72 S.Ct. 623, 342 U.S. 950, 96 L.Ed. 706	35
Krausse v. United States, 194 F.2d 440	43
In re Kullman, 87 F.Supp. 1001	25
J. B. Montgomery, Inc. v. United States, 206 F.Supp. 455, affd. 84 S.Ct. 884, 376 U.S. 389, 11 L.Ed.2d 797, reh. denied 84 S.Ct. 1218, 377 U.S. 925, 12 L.Ed.2d 217	39
Application of Murra, 178 F.2d 670	40
N.L.R.B. v. Pettyman, 117 F.2d 786	41
Petition of Petcheff, 142 F.Supp. 494	42
Schneiderman v. United States, 63 S.Ct. 1333, 320 U.S. 118	21
Simmons v. United States, 348 U.S. 397, 75 S.Ct. 397	38

	<u>Page</u>
Petition of Sittler, 197 F. Supp. 278, affd. Sittler v. United States, 316 F.2d 312, cert. den. 84 S. Ct. 702, 376 U.S. 932	33
Stark v. Wickard, 64 S. Ct. 559, 321 U.S. 288	40
Stasiukevich v. Nicolls, 168 F.2d 474	25, 34, 41
Stevens v. United States, 190 F.2d 880	40
Tatum v. United States, 270 U.S. 568, 70 L. Ed. 738, 46 S. Ct. 425	1
United States v. Anzalone, 100 F. Supp. 987, reversed 197 F.2d 714	33
United States v. Girouard, 149 F.2d 760	34
United States v. Lehigh Val. Co-op. Farmers, 183 F. Supp. 80, reversed 287 F.2d 726, reversed 82 S. Ct. 1168, 370 U.S. 76, 8 L. Ed. 2d 345	39
United States v. Rossler, 144 F.2d 463	25
United States v. State of California, 67 S. Ct. 1658, 332 U.S. 19, supplemented 68 S. Ct. 20, 332 U.S. 804	39
United States ex rel. Hirshberg v. Malanaphy, 168 F.2d 503, revd. 69 S. Ct. 530, 336 U.S. 210	39

Statutes

8 U.S.C. §1424	16, 18, 34
8 U.S.C. §1445	2
8 U.S.C. §1446	35
8 U.S.C. §1446(b)	2, 9, 12, 19, 35

	<u>Page</u>
8 U.S.C. §1446(c)	3, 19, 35
8 U.S.C. §1446(d)	3, 19, 20, 35, 40
8 U.S.C.A. §1447	1
8 U.S.C. §1447(a)	4

Regulations

U.S. Code Cong. News, Administrative Regulations Under the Immigration and Nationality Act:

§335.12	3, 37
§335.13(c)	3, 37
§336.11	3, 38
§336.13	38
§336.14	38

N O. 2 2 2 0 9
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERICH K. W. RENNER,

Appellant,

vs.

IMMIGRATION & NATURALIZATION
SERVICE,

Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from a judgment and order of the United States District Court in the Central District of California denying appellant's petition for naturalization.

Title 8, U.S.C.A. §1447 confers jurisdiction on the District Court to hear the petition for naturalization. The United States Court of Appeals has jurisdiction to hear an appeal from the judgment and order denying naturalization. (Tatum v. United States, 270 U.S. 568, 70 L.Ed. 738, 46 S.Ct. 425). Notice of appeal was filed in the time and manner required by law (CT 80). (References to CT are to the Clerk's Transcript; RT are to reporter's transcript.)

STATEMENT OF THE CASE

Appellant petitioned for naturalization pursuant to 8 U. S. C. §1445. He was then the trainer of guide dogs for International Guiding Eyes. One of his sponsors was Kurt Herman, an employee (RT p. 137, line 17 et. seq.). Before any hearing, petitioner resigned as the trainer for International Guiding Eyes (RT 26) and went to work for Eye Dog Foundation, a competitor of International Guiding Eyes (RT p. 27, line 2). Shortly thereafter objections to his petition were made by the same Kurt Herman and three other employees of International Guiding Eyes (Ct. Ex. 1A, 1B, 1C, 1D). The objections took the form of an accusation that petitioner, while a trainer for International, had had some medical treatment for his own dogs which had been charged to International. Two of these objectors also claimed that petitioner was not attached to the principles of the United States because he had, on several occasions in the past, made certain statements.

An investigation was conducted before an employee of the Immigration Service. (8 U. S. C. §1446 (b)). Though that section provides for the taking of testimony of the petitioner and his witnesses, the examiner only took the testimony of the witnesses in opposition. (Ex. 1A, 1B, 1C, 1D, 1E, 1F; RT 121, 133, 211. The transcripts appear in the Clerk's Transcript, but the pagination on our copy cannot be seen.) The question was raised by the objection to the admission of the record (RT 121, 133, 211) and by the appeal from the judgment (CT 80).

In the discretion of the Attorney General, the record, with the recommendation of the employee designated to investigate, may be transmitted, to the Attorney General (8 U. S. C. §1446 (c)). The record of this trial, and what the investigator made as a record, do not show that the Attorney General ever exercised such discretion. (This question was raised by the objections to Findings and Conclusions of Examiner [CT 50], by the objection to admission [RT 121, 133, 211], by the motion for a new trial [CT 65] and by the appeal from the judgment [CT 80]). U. S. Code Cong. News, Administrative regulations under the Immigration and Nationality Act §336. 11 provide that the Commissioner may make contrary findings; and if he did, a person other than the examiner shall represent the government. There is no record of any action by the Commissioner, and the same examiner represented the government.

Where the recommendation of the employee and that of the Attorney General do not agree, both views shall be submitted to the trial court. (§1446d). No recommendation of the Attorney General was ever submitted. In view of that failure, appellant contends that a necessary step in the administrative-judicial process has been left out. This question was raised by the objections to the Findings of the Examiner (CT 50), the motion for a new trial and the appeal from the judgment. U. S. Code Cong. News, Regulations, §335. 12 provide for submission to the Commissioner. The record does not show that this was done. If there was disagreement, petitioner was entitled to notice (Regl. §335. 13

(c)) and both recommendations were to be submitted to the court. This was not done. The question was raised by the objections to the Findings of the Examiner, the motion for a new trial and the Notice of Appeal.

The recommendation of the investigator was that the petition for naturalization be denied because petitioner had failed to show (1) good moral character; and (2) attachment to the principles of the Constitution and government of the United States (CT 44).

The matter was then brought on in the trial court (8 U. S. C. §1447 (a)). Petitioner and thirteen witnesses testified favorably to petitioner. The four employees of his former employer testified unfavorably. All four testified to alleged use of a veterinary for petitioner's dogs at the cost of the employer. Two testified to comments petitioner is said to have made about Hitler and Germany.

The transcript of the preliminary examination, as limited by the examiner, was offered in evidence and received over objection (RT 121, 133, 211). The recommendation of the examiner (CT 44) was admitted. With that, and the transcripts, was submitted a letter written to the Immigration Service in November, 1956 (CT 43). Of course the writer could not be cross-examined.

The court found (CT 71) that there had been no irregularity insofar as services for petitioner's dogs were concerned, and therefore supported petitioner on the issue of good moral character.

The court found that petitioner was not attached to the principles of the Constitution because petitioner had made the following statements:

- (1) that Hitler was not a bad man;
- (2) that Hitler was needed in Germany;
- (3) that the Nazi Party was preferable to the two major political parties in this country;
- (4) that conditions in Germany were much better than here under our existing form of government;
- (5) that he will retire in Germany.

Naturalization was denied (CT 72).

On a motion for a new trial, the trial court stated in its decision that the judgment was based solely upon its own evaluation of the testimony adduced at the independent hearing and without regard to any of the preliminary examination materials (CT 78).

Finding (3) is not supported by the testimony. This question was raised by the motion for a new trial and by the appeal.

Finding (4) does not show what "conditions" petitioner is said to have made reference to. "Conditions" being vague and the time stretches backward from the American occupation (when the United States was contributing substantial help and taxing the American citizens here for it), or before, when petitioner was in a submarine, at sea; or before that when petitioner was between 10 and 16 years of age. This question was raised by the motion for a new trial and by the appeal.

The trial court should have, and this Court may, take

judicial notice of the fact that the Nazi party gained control in Germany January 30, 1933, when petitioner was 10 years old; that World War II began in September, 1939 when petitioner was 16 years old; that the United States did not become a belligerent until December, 1941. Thus when World War II began, petitioner was only 16 years old, and when the United States became a belligerent petitioner was 18 years old and already at sea as a submariner. He was 23 when the war was over and from then until he came to the United States he was under the American occupation.

The entire testimony allegedly supporting petitioner's lack of attachment to the United States Government is annexed to this brief. It is culled from the testimony of the witnesses Arthur Marinaccio and Audrey Whetzel. The balance of their testimony relates to their accusation that petitioner charged treatment for his own dogs to his employer (and on this count the court found their testimony untrue).

FACTS

Petitioner Erich Renner was born November 1, 1923. He went to regular and trade school until he was 16-1/2 (1940); then he worked in a factory and at 17 he went into the German Navy. He was in the Navy from late in 1940 to June of 1945 (RT 10). He had to join the Hitler Youth. Every youth was required to do so (RT 11). However he was never a member of the Storm Troops. He was in the Navy submarine service until the war ended (RT 12).

While in the Navy he moved up four ranks and came out a non-commissioned officer (RT 11). When he came out of the Navy he joined a school for Guide Dogs (RT 12). In 1947 he became a member of the West German police, and served there until September 3, 1955, when he came to the United States (RT 12)

According to the laws and regulations of the American occupation forces, every police officer had to be investigated and de-nazified; and he was cleared of any connection with the Nazi party (RT 13 and 48). He was subject to the control of the allied forces during the time he worked on the police force (RT 13) and he worked closely with American officers and was assigned to special duty with the military police and the C. I. D. (RT 14). He had always talked about going to the United States because he always had a love for the United States. His association with the American forces over there made that feeling even stronger (RT p. 14, line 15). He wanted to make a success here and the longer "we" (he and his family) stayed the more he made up his mind to stay (RT p. 15, line 2).

He came to the United States through a German group which asked him if he would like to come and manage a large German shepherd dog kennel which was trying to breed German shepherds, train for the blind and for police work (RT 15). The kennel he was supposed to work for agreed to pay his fees for shipping, wanting to use a dog he brought for breeding. No contract was made except that petitioner could pay the costs back as he saw fit later (RT 16). He went to South Carolina where the kennels were

and the owner of the kennel allowed his attack dog to attack petitioner because he wanted to see how the "great" German trainer would react (RT 16). He was supposed to receive \$350.00 per month but instead once in a while the owner handed him ten or fifteen dollars (RT 17). Altogether the situation was unbearable. Despite this and the fact that his two children had to walk two miles to the school bus stop (RT 18) petitioner stayed on there for four months (RT 19). Finally he told the employer he was leaving and the Sheriff and a friend of the Sheriff helped "them" move to another farm, where he worked for another few months (RT 20). Then he went to New York where there was a school for training guide dogs for the blind, and he got a job as an apprentice trainer (RT 21). After three or four months he went to Indiana where they might settle, with the help of some people (RT 22). Shortly after going to Indiana he received an offer from California to come out there and take over at a guide dog school called International Guiding Eyes. That was in 1958 (RT 22). He worked there as a trainer for the blind for eight years (RT 23). His children were eleven and twelve when he came to the United States (RT 23). At 17, his son wanted to go into the United States Armed Services and he encouraged him. He wanted him to go in the Navy but the son preferred the Air Force. Both he and his wife had to sign a consent for the boy to enlist because he was under eighteen (RT 24). Petitioner and his wife applied for citizenship 2/11/65 (RT 60). One of his sponsors was Kurt Hermann who worked for International Guiding Eyes (RT 30).

About six or eight weeks before he resigned from International Guiding Eyes the general manager retired and a new manager was installed. The new general manager and petitioner did not get along well and petitioner resigned (RT 26, 27, 28, 29) October 1st or 15th (RT 113). He immediately went to work for another foundation for the blind (RT p. 27, line 2).

After he resigned from International Guiding Eyes, Kurt Hermann, who had been one of his sponsors, Arthur Marinaccio (RT 53), John Maher (RT 53), who was the new manager with whom he couldn't get along, and Audrey Whetzel opposed his citizenship application (CT Ex. 1A, 1B, 1C, 1D). All were employees of International, his former employer. His wife's citizenship was granted (RT p. 35, line 24).

With respect to an accusation that petitioner charged his employer for veterinary services rendered his own dogs, petitioner pointed out that not only had he not doen so, but he sent many dogs to the organization, he donated many of his own dogs to the organization, and friends of his had donated many services, food and dogs (RT 56).

Upon the statements of the persons working for International Guiding Eyes, an investigation was conducted by the Immigration employee. Only the opposition witnesses were questioned (CT) although the Code (8 U.S.C. §1446(b)) requires that the examiner take the testimony of the petitioner and his witnesses. The examiner, without any approval or disapproval of the Attorney General made his recommendation for rejecting citizenship (and this was later intro-

duced into the trial record.) There was no recommendation or review by the Commissioner.

On the trial before the court, in addition to petitioner's own testimony, petitioner offered the testimony of Terry Kahn, a college instructor (RT 64) who had known the petitioner for two and a half years. Mr. Kahn is Jewish (RT 66) and when he met petitioner, he had reservations about him because petitioner had served in the German services in Nazi Germany (RT 66 and 69). The witness had many friends who suffered under the Nazi regime. He had talked about Nazism and Nazi Germany and the United States policies with the petitioner during the two and one half years he knew him (RT 67). When asked whether petitioner had, in that two and one half years ever indicated, directly or indirectly, that he had or would have loyalty to a government such as the Third Reich or the Nazis, he answered "Unequivocally No." (RT 67).

Mrs. Helen Kahn, who had lost some members of her family to the Nazi regime gave testimony to the same effect (RT 72-75).

Jay Koch, who knew the petitioner for four or five years, gave the same testimony, based on his own experience (RT 76).

Reginald Richard Kay, who knew the petitioner for three years gave the same testimony, based on his own experience (RT 88).

Gwinn Wiley, who knew the petitioner for six years, gave testimony that he would make a good citizen, but she was not questioned about political discussions (RT 91). She was a blind person.



Dorothy Scott, who was one of the commissioners on the State Guide Dog Board, where she served for fifteen years, testified she knew petitioner for eight years and gave him his license as a guide dog trainer. The Board checked his background and if it had been found that petitioner had any leanings toward foreign governments as opposed to the government of the United States that would possibly have kept him from getting a license (RT 93). She was threatened by Kurt Hermann with the removal of her dog (she is blind) (RT 97). She also testified that the State Board had checked out petitioner and had found him satisfactory. She advised that the investigation was on file with the State Guide Dog Board (RT 99). There is no evidence that the records had been checked out by the "investigator" for the Immigration Service, who was now a partisan opposing petitioner's naturalization. His partisanship is obvious in the "hearings" and in the trial. Often his questions are leading.

The next witness, called by the Immigration Examiner, is John Maher, the new general manager for International Guiding Eyes. His testimony is full of hearsay (RT 102, 103, 104, 105, 106, 107, 108, 109).

Kurt Hermann, next called by the examiner (RT 122), testified he knew the petitioner since 1956 (a matter of ten years). This witness had no recollection of petitioner doing anything wrong. The examiner insisted on telling him what he had testified to in the examiner's investigation, over objection of counsel (RT 128) and he introduced a transcript of what the witness had said (RT 129). Not

as "The Record" as per §1446(b) but as a refresher. The examiner then reminded the witness that he wished to withdraw his recommendation as a subscribing witness (RT 132). The reason the witness gave for doing so was that petitioner had a violent temper and "he flares up every time you reason with him" (RT 132). This from a man who knew him for ten years and only after petitioner left the employ of International Guiding Eyes was he withdrawing his subscription. Significantly, although this witness knew the petitioner for ten years, he never discussed the Government of the United States (RT 132).

Arthur Marinaccio testified he knew petitioner since 1956, a matter of ten years (RT 150). This witness' testimony, with respect to petitioner's attachment to the United States, is restated in the appendix to this brief.

Audrey Whetzel, testified she knew petitioner since 1960 (RT p. 183, line 25). She met him then when she applied for a guide dog. She didn't see him or hear from him again until 1964 (RT p. 184, line 2). This witness' testimony with respect to petitioner's attachment to the United States, is restated in the appendix to this brief.

It is difficult to specify what the witnesses claim respondent said to support Findings (3) and (4). The witness Whetzel said with respect to those Findings:

186. 8. Q. Insofar as any conversations now specifically with the Government of the United States is concerned, has he ever made any comments with respect

to the two-party system?

A. He doesn't feel that either party is the right one.

Q. What is it that he said, Mrs. Whetzel, in regard to the two party system, in regard to his opinion, or what you consider his opinion?

A. That neither one is the right one.

24. Q. Has he indicated by way of conversation that he prefers the Nazi form of government to the form of government of the United States?

187. 2. A. To me, yes. The fact that he claimed that Adolph Hitler was such a great man, and that the conditions that they lived in Germany were far superior to what they are here under our form of government.

She identified a complimentary letter she had sent petitioner in 1964.

It would seem from a careful reading of the testimony of both Whetzel and Marinaccio, that it does not support Findings (3) and (4). A statement that neither party is the right one hardly means that the Nazi Party was preferable to the two major political parties in this country; nor does Marinaccio's vague answer help support it.

177. 51. A. It is kind of hard to try to pick up specific things that were said. I can't -- I mean I would only be guessing at half the stuff, I mean I don't remember anything specific that was said from time to time. We are talking about years ago now.

to the two-party system?

A. He doesn't feel that either party is the right one.

Q. What is it that he said, Mrs. Whetzel, in regard to the two party system, in regard to his opinion, or what you consider his opinion?

A. That neither one is the right one.

24. Q. Has he indicated by way of conversation that he prefers the Nazi form of government to the form of government of the United States?

187. 2. A. To me, yes. The fact that he claimed that Adolph Hitler was such a great man, and that the conditions that they lived in Germany were far superior to what they are here under our form of government.

She identified a complimentary letter she had sent petitioner in 1964.

It would seem from a careful reading of the testimony of both Whetzel and Marinaccio, that it does not support Findings (3) and (4). A statement that neither party is the right one hardly means that the Nazi Party was preferable to the two major political parties in this country; nor does Marinaccio's vague answer help support it.

177. 51. A. It is kind of hard to try to pick up specific things that were said. I can't -- I mean I would only be guessing at half the stuff, I mean I don't remember anything specific that was said from time to time. We are talking about years ago now.

In opposition to this garbled testimony which seems remote from the actual Findings, we have petitioner's direct answers.

On cross-examination he was directed to his application and the question which asked DO YOU BELIEVE IN THE UNITED STATES CONSTITUTIONAL FORM OF (RT 57). GOVERNMENT OF THE UNITED STATES? YES, I DO.

Asked whether he preferred a government under the National Socialists, he answered

(RT 58) THAT HE NEVER PREFERRED A GOVERNMENT UNDER THE NATIONAL SOCIALISTS. A GOVERNMENT AS PRACTICED UNDER THE THIRD REICH.

He gave other pertinent answers.

(RT 33, line 23) THAT HE HAD NO OBJECTION TO BEARING ARMS FOR THE UNITED STATES

(RT 34, line 6) HE HAD NO FEELING OF LOYALTY TO THE NAZI REGIME.

(RT. 35, line 17) HIS SON IS MARRIED A JEWISH GIRL.

(RT 46, line 22) HIS FATHER WAS PERSECUTED BY THE NAZI FOR HIS POLITICAL BELIEFS.

(RT 58) HE PARTICIPATED IN DISCUSSIONS AND CRITICIZED BUT NOT IN A WAY TO CHANGE.

(RT 59) HE NEVER SAID HITLER AND HIS POLICIES WERE COMMENDABLE IN ANY SHAPE OR FORM.

(RT 59) HE INTENDS TO RESIDE PERMANENTLY IN THE UNITED STATES.

Petitioner called other witnesses.

John S. Roberts had been a member of the Board of Directors of International Guiding Eyes for ten years and knew petitioner for the entire time he was employed with International. The discussions he had had with the petitioner make him feel petitioner would be a good citizen and he would sponsor him.

Dr. Fred L. Newberry, a veterinarian, testified he knew petitioner for eight or nine years, visited in his home (RT 243) had many talks with him because both had been in their country's service, and petitioner never said anything that indicated he had more love for the Nazi regime than the United states (RT 244). He thought petitioner's feeling was to the contrary (RT 244).

Norbett Frank Renner, petitioner's son, now 21, testified that his father had encouraged him to go into the armed forces. That his father would fight for the United States (RT 254).

Hobart Stephenson, President of the California State Board of Guide Dogs for the Blind. He knew petitioner for six years; and trained under him twice (RT 256). He got into political discussions with petitioner and found that petitioner came to this country to get away from the old German Reich. That he thinks petitioner would make a good citizen and he would sponsor him.

Edward Raiden, an attorney and member of the Board of petitioner's new employer stated he knew him for seven years (RT 180); that in the blind community the petitioner's reputation was good; that he thought petitioner would make a good citizen and he would be glad to sponsor him (RT 182).

QUESTIONS PRESENTED

I

Assuming but not conceding, that the five findings were supported by the evidence, do they not constitute a basis for refusing naturalization?

II

The evidence does not support the findings.

III

Does 8 U.S.C. §1424 express Congress' complete intent as to a basis for refusing naturalization?

IV

Was it a failure of Procedural Due-process for the "examiner" to take the testimony of witnesses in opposition to naturalization without taking the testimony of petitioner and his witnesses?

V

Was it required to show that the Attorney General had decided not to review the case, or can the investigator make that decision for him?

V. a. Where the statute provides that if the Attorney General makes a contrary recommendation both shall be submitted to the court; was it required that the government show that the Attorney General had not recommended; or that he had, in accord with investigator; or must the Attorney General act one way or another?

V. b. The rules adopted by the Immigration and Naturalization

Department are contrary to statute and still were not followed. Did the court commit error in admitting the transcripts of hearings before the examiner? They do not show that petitioner was present. Admitted with them (all over objection) was a letter sent 10 years before by a person not present for cross-examination.

VII

Congress did not intend that examiner act as a partisan.

- VII. a. Is the test of what petitioner will do, made by what some stranger says he said, or is it what he says in petition or in testimony, or by certain actions inimical to the United States?
- VII. b. Is petitioner given opportunity to refuse to serve in Military or can anyone who asks him put him to test? Suppose he said to Whetzel he would not serve and the United States then asks him to and he is willing -- does it mean he still will not? (RT p. 34, line 1 -- he will)
- VII. c. If he tells Whetzel he will retire in Germany -- or that he will go to the moon -- is that so binding that when asked, he can't change his mind -- or say he does not intend to retire in Germany?

SUMMARY OF ARGUMENT

I

The Findings of the court do not support rejection of naturalization because the statements attributed to petitioner were mere comment and do not show either a lack of attachment to the principles of the Constitution or an unfavorable disposition towards the United States.

II

The evidence does not support the findings. The witnesses for the government attributed certain conversations to the petitioner but the conversations do not contain the statements attributed to the petitioner nor substantially those statements. He is said to have said that Hitler was not a bad man; a system is better when the government controls it; conditions he lived in Germany were superior to what they were here; speaking of the two party system, neither party was the right party; or he would retire in Germany.

III

8 U.S.C. §1424 spells out limitations on who may be naturalized, including in its orbit (1) nihilists (2) members of or affiliated with the Communist Party, or a totalitarian party of the United States, or Communist fronts (3) advocates of world Communism, or the establishment in the United States of a totalitarian dictatorship, or members of an organization which advocates such (4) advocates or teaches or is a member of or affiliated with an organization which advocates or teaches the overthrow by force or other unconstitutional means of the government of the United States

or all forms of law; or the duty or propriety of unlawfully assaulting or killing any officers of the United States or any other organized government; or unlawful injury or damage to property; or sabotage; or (5) who writes or publishes or causes to be written or publishes any advocacy of any of the doctrines of world Communism or the establishment in the United States of a totalitarian dictatorship; (6) member of, affiliated with, any organization that writes, etc., or causes to be written, etc., or has in its possession for the purpose of circulation, etc., any material as above outlined. Petitioner falls into none of these, and the court could not enlarge the limitations to the comments attributed to the petitioner.

IV

An administrative agency should make a fair and complete record and when the examiner was directed by 8 U.S.C. §1446(b) to take the testimony of witnesses and the petitioner, it was a failure of due process to take only the testimony of the government witnesses.

V

8 U.S.C. §1446(c) provides that after the hearing before the examiner, the record may be transmitted to the Attorney General for his recommendation. Sub(d) of that section provides that where the recommendation of the examiner and the Attorney General conflict, both shall be submitted to the court. The record is devoid of any showing that the Attorney General ever saw the record or made any recommendation, so nothing of that nature was



submitted to the court. Since the petitioner is entitled to the benefit of any recommendation by the Attorney General if there is no conflict, the failure to submit the matter to the Attorney General deprived petitioner of that consideration. The procedure above laid out in the statute is overruled by the Commissioner of Immigration without any authority or delegation of authority from the Congress. After setting up different regulations the Immigration & Naturalization Department still did not follow their own regulations which call for a review by the Commissioner, and notice to the petitioner of the Commissioner's recommendation.

VI

It was error to admit the record made by the examiner since that contained a hearsay letter written ten years before the petitioner applied for naturalization.

VII

The examiner acted as a partisan in the trial before the court although the statute 1446(d) intended not only that both recommendations should be submitted to the court but that another officer of the service should make the presentation.

VIII

The statements attributed to petitioner; that he would not serve in the armed forces; and would retire in Germany; were used to foreclose him from a present willingness to serve in the armed forces and an intention to live in the United States permanently.

ARGUMENT

POINT I

THE FINDINGS OF THE COURT DO NOT SUPPORT REJECTION OF NATURALIZATION

The findings: (1) that Hitler was not a bad man; (2) that Hitler was needed in Germany; (3) that the Nazi Party was preferable to the two major political parties in this country; (4) that conditions in Germany were much better than here under our existing form of government; (5) that he will retire in Germany.

Assuming but not conceding, that these findings were supported by the evidence they must be considered in the light of the applicable law. Schneiderman v. United States, 63 S. Ct. 1333, 320 U.S. 118, contains expressions which are a helpful guide. (138)

"Whatever attitude we may individually hold towards persons and organizations that believe in or advocate extensive changes in our existing order, it should be our desire and concern at all times to uphold the right of free discussion and free thinking to which we as a people claim primary attachment. To neglect this duty in a proceeding in which we are called upon to judge whether a particular individual has failed to manifest attachment to the Constitution would be ironical indeed."

* * *

"(157) There is a material difference between agitation and exhortation calling for present violent action

which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time -- prediction that is not calculated or intended to (158) be presently acted upon, thus
*leaving opportunity for general discussion and the calm processes of thought and reason. Cf. Bridges v. California, 314 U.S. 252, 86 L.Ed. 192, 62 S.Ct. 190, and Justice Brandeis' concurring opinion in Whitney v. California, 274 U.S. 357, 372-380, 71 L.Ed 1095, 1104-1108, 47 S.Ct. 641. See also Taylor v. Mississippi, 319 U.S. 583, ante, 1600, 63 S.Ct. 1200; Nos. 826-828 this term. Because of this difference we may assume that Congress intended, by the general test of 'attachment' in the 1906 Act, to deny naturalization to persons falling into the first category but not to those in the second. Such a construction of the statute is to be favored because it preserves for novitiates as well as citizens the full benefit of that freedom of thought which is a fundamental feature of our political institutions." (Emphasis added)

Finding (1) Hitler was not such a bad man.

Taken in context, that at a movie the crowd hissed and petitioner then said "they shouldn't have done that, Hitler was not

such a bad man" (185, line 1); the statement was the expression of an individual. Petitioner never condoned the killing of the Jews (152, line 18). Nor was this statement ever enlarged. Would it disqualify for citizenship a person who would say Napoleon was a great man (though he was responsible for millions of lives lost); or Genghis Khan; or President Johnson; or George Washington (though he led a rebellion); or Abraham Lincoln (despite the Civil War)?

Finding (2) Germany needed Hitler.

What does that mean? When? To do what? Most people agree he destroyed Germany. One witness said the petitioner said, "If I had known the conditions after the First World War until Adolph Hitler took over I would realize that he wasn't such a bad man" (184, line 18). How do we apply that? If we are to exercise judgment, we should know what we are talking about. When Hitler came to power, petitioner was 10 years old. Did he know then how to form a judgment?

If a man ultimately becomes a murderer should we say anyone who knew him or liked him or can remember him "when" is not attached to principles we consider desirable?

Finding (3) that the Nazi Party was preferable to
the two major political parties in this
country.

If such a statement had been made by petitioner (and neither the petitioner's testimony, nor that of the Government's witnesses

support it (Point II) it still means very little. It is a comment made by a person in a discussion. Does it show a lack of attachment to the Constitution? Or an unfavorable disposition to the United States?

Perhaps the Nazi Party was preferable in Germany! Certainly the comment does not mean that the Nazi Party was preferable in the United States. Even in Germany the Nazi Party is no longer preferable to the Germans. Again, we come to the time. Preferable to the Germans -- when? In what way? For what purpose? As a buffer against the communists to the east, it might even now be preferable for the military posture of the United States. Without definition the statement has no real associated meaning as to disposition to the United States; or attachment to the principles of the Constitution.

Finding (4) that conditions in Germany were much
better than here under our existing
form of government.

This finding is not supported by the evidence. If it were, however, what does it mean in relation to attachment to the constitution? How could it show an unfavorable disposition to the United States?

What conditions? Conditions when? In our statement of the case we ask about "conditions". But one thing more with respect to this and that is: if we are supporting the Germans, are our "conditions" better than theirs"? If they are under American occupation are their "conditions" our "conditions" or their

"conditions"?

Finding (5) that petitioner will retire in Germany.

This is clearly against the weight of the evidence. But arguendo, that might be in 20 or 30 years. Does it show a lack of attachment to the constitution? Or an unfavorable disposition to the United States? Perhaps 50 per cent of the people here speak of retiring to the country in their old age; or of traveling. Does this mean that they will do so? And if it does, is their urban residence temporary?

In passing upon the application for naturalization, the court exercises judicial judgment and does not confer or withhold a favor. Stasiukevich v. Nicolls, 168 F. 2d 474.

Let us ask ourselves also whether approval of the Nazi Party for Germany means approval of the Nazi Party for the United States. Applicant's opinion about other countries is not to be contemplated. In re Kullman, 87 F. Supp. 1001. Nor is it proof that he wished the political principles which he favored for Germany to prevail in the United States; and if he did, that he endorsed force or violence to compel the institution of such principles here. United States v. Rossler, 144 F. 2d 463.

POINT II

THE EVIDENCE DOES NOT SUPPORT THE FINDINGS

We will take the findings seriatim, pointing to all we find

in the testimony that could support them.

Finding (1) that Hitler was not a bad man.

Both witnesses gave testimony that supported this finding.

Finding (2) that Hitler was needed in Germany.

Marinaccio. Nothing in this witness' testimony supports Finding (2). Whetzel. Nothing that directly supports this finding. However, petitioner's alleged statement (184, line 18) "If I had known the conditions after the first World War until Adolph Hitler took over I would realize that he wasn't such a bad man" by some tenuous interpretation might be claimed to support the finding.

Finding (3) that the Nazi Party was preferable to
the two major political parties in this
country.

Marinaccio. (160, line 15)

"Q. Specifically what type of freedom do we have that he didn't believe in?

"A. He didn't believe -- he believed that actually a system was better when the government controlled it, which is what he said they had at home.

(177, line 5) "Q. Now, specifically what did Mr. Renner, specifically what did he say that led you to believe that he thought -- if you did -- that he thought the Nazi regime or government, that he preferred that to our

country? What specifically did he say praising that government?

"A. It is kind of hard to try to pick up specific things that were said. I can't -- I mean I would only be guessing at half the stuff, I mean I don't remember anything specific that was said from time to time. We are talking about years ago now."

Whetzel. (186, line 8)

"Q. Insofar as any conversations now specifically with the Government of the United States is concerned, has he ever made any comments with respect to the two-party system?

"A. He doesn't feel that either party is the right one."

(Objection sustained)

(186, line 20) "Q. What is it that he said, Mrs. Whetzel, in regard to the two party system, in regard to his opinion, or what you consider to be his opinion?

"A. That neither one is the right one.

24. "Q. Has he indicated by way of conversation that he prefers the Nazi form of government to the form of government of the United States?

(187, line 2) "A. To me, yes. The fact that he claimed that Adolph Hitler was such a great man, and that the conditions that they lived in Germany were far superior

to what they are here under our form of government. "

Finding (3) can only be said to be supported by some remote interpretation. The only direct statement that petitioner prefers the Nazi form of government is the witness' own belief based on petitioner's alleged statement that Adolph Hitler was such a great man and that conditions that they lived in Germany were far superior to what they are here under our form of government.

Finding (4) that conditions in Germany were much
better than here under our existing
form of government.

With respect to this finding, there seems to be nothing directly in point. The trial court may have made this finding on an attenuated basis and we must look through the entire appendix for support. The Finding contains two keys: "conditions" and "our existing form of government". With that in mind we will quote everything that might possibly bear on it.

Marinaccio: (151, line 8, et seq.)

8. Well, well he had some real wild ideas about our form of government.

13. He thought there was many things about our government that he didn't like.

14. He thought it was better back home. He expressed this on many different occasions.

17. Back in Germany. He, especially in the be-

ginning when I first knew him (1956).

18. I had to be fair in that respect -- when I first knew him, I mean he

20. was very outspoken about his feelings about his own country.

23. Well, he felt their way of doing things were a lot better than ours. In

24. other words, he didn't think we had enough government control of

25. things over

(152, line 1) here, things were done very loosely.

21. What specific criticisms did he level at the Government of the United

22. States, or the way the Government operates in the United States?

24. Well, I guess it is just that the system that he was brought up under -- I mean they didn't have the (153, line 1) freedom that they have here, and he didn't quite agree that it was right at all times.

3. I mean it is specifically hard to evaluate what he did say about this, that and the other things, I mean, a lot of these things were said many,

5. many years ago. But he definitely was very much against a lot of the things that we did here.

(159, line 22) 1956 or 1957.

(160) 8. Yes. Exactly what did he say and what did

you say about the constitution of the United States?

13. Well, he didn't believe in the type of freedom that we have, basically.

15. Specifically what type of freedom do we have that he didn't believe in?

17. He didn't believe -- he believed that actually a system was better when the government controlled it, which is what he said they had at home.

24. Mr. Marinaccio, can you remember anything specifically that he said along that line at any time?

(161) 1. Not offhand, no.

(177) 5. Now, specifically what did Mr. Renner, specifically what did he say that led you to believe that he thought -- if you did -- that he thought the Nazi regime or government, that he preferred that to our country? What specifically did he say praising that government?

(177) 11. It is kind of hard to try to pick up specific things that were said. I can't -- I mean I would only be guessing at half the stuff, I mean I don't remember anything specific that was said from time to time. We are talking about years ago now.

Whetzel. (184, line 4)

"Q. Insofar as your association with Mr. Renner is concerned, did you at any time have occasion to, during your associations, to discuss with Mr. Renner anything with regard to the United States Government, or the Constitution of the United States?

"A. There were many conversations, but one that I remember, he said that the American people on the whole were stupid, that the Government that Germany had during the Second World War was not as bad as we were made out to be -- these were his words -- that the people do need discipline, and this was a good government . . ."

(186) 24. Has he indicated by way of conversation that he prefers the Nazi form of government to the form of government of the United States?

(187) 2. To me, yes. The fact that he claimed Adolph Hitler was such a great man, and that the conditions that they lived in Germany were far superior to what they are here under our form of government.

From a reading of the above, or all the testimony, it is obvious that the witnesses did not say what Finding (4) says. The references to form of government and system and type of freedom (including speech and ideas) and two party system are used interchangeably. They show an intention on the part of the witness to

hurt petitioner, giving only heat and no light. The examiner and the trial court have substituted the opinions of these two witnesses for that of the petitioner, as well as for their own.

Finding (5) that he will retire in Germany.

This finding has some testimony directly in point. On this point Marinaccio believed he said it years ago (154, line 3) he didn't know whether petitioner had meant it and he didn't know petitioner's feelings now. (154, line 8) he wasn't sure it was within the past five years. Whetzel testified (185, line 24) that he said that he had no intention of staying here all his life, that he was going to retire in Germany. The witness repeated this particular statement as a response to a different question. (195, line 14) That non sequitur was followed by this exchange. (201, line 17) "Oh, what did you say that caused Mr. Renner to make such a statement to you?" (201, line 23) "He was talking about his son joining the army. And he didn't have too much love for his boy -- in fact, the way I understood it the boy joined the army because he wanted to get away from home." (202, line 2) "And I said, 'Wouldn't you like to think that he has become an American citizen?' And he said, 'OH, YES'." (202, line 5) "I said, 'Wouldn't you like to think that he has found a home here and he loves this country? Wouldn't you like to feel this way?' And he said, 'I would never fight for this country.' "

Petitioner's son testified (253) that he was 21 and was in the United States Air Force. He entered the service when he was

seventeen and he had to get the signatures of his parents to enter the service. He did not enter the service to get away from home (253, line 22). His father encouraged him to enter the service. He had seen service in Viet Nam and was now a citizen (254, line 25). His father (petitioner) would serve as he had. (255).

With respect to finding (5) we are asked to believe petitioner would go back to Germany, although his wife and son were citizens here, the son is in the service here and married, and his only other child is here also. Petitioner is a trainer of Guide dogs for the blind, an occupation that does not pay too well in cash, but has all the elements of service to humanity.

Where the testimony of government witnesses in a naturalization proceeding was fragmentary, indefinite and remote, it could not stand alone to support denial of naturalization. Petition of Sittler, 197 F.Supp. 278, affirmed Sittler v. United States, 316 F.2d 312, cert. den., 84 S.Ct. 702, 376 U.S. 932.

POINT III

THE POWER TO DECLARE WHO MAY BECOME CITIZENS RESTS WITH CONGRESS AND NEITHER THE COURTS NOR ANY ADMINISTRATIVE AGENCY MAY EXTEND OR RESTRICT THE REQUIREMENTS ESTABLISHED BY CONGRESS.

United States v. Anzalone, 100 F.Supp. 987,
reversed 197 F.2d 714.

Section 1424 (8 U.S.C.) has a caption head as follows:
PROHIBITION UPON THE NATURALIZATION OF PERSONS OPPOSED TO GOVERNMENT OR LAW, OR WHO FAVOR TOTALITARIAN FORMS OF GOVERNMENT.

In that section, in great detail, Congress has set up restrictions against naturalization of persons who favor totalitarian forms of government. Nothing in the record places the petitioner within the orbit of those limitations. The finding that petitioner is not qualified to become a citizen is something added by the examiner and by the trial court. The cases do not support or approve such an additional limitation. *Ex parte Fillibertie*, 62 F. Supp. 744; *United States v. Girouard*, 149 F. 2d 760, reversed 66 S. Ct. 826, 328 U.S. 61.

The feeling of the individual Judge IS NOT THE CORRECT TEST. *Stasiukevich v. Nicolls*, 168 F. 2d 474.

POINT IV

IT WAS A FAILURE OF DUE PROCESS FOR THE EXAMINER TO TAKE THE TESTIMONY OF WITNESSES IN OPPOSITION TO NATURALIZATION WITHOUT TAKING THE TESTIMONY OF PETITIONER AND HIS WITNESSES.

An administrative agency does not do its duty when it merely decides upon a poor or non-representative record. As sole representative of public, which is third party in administrative proceedings, agency owes duty to investigate all pertinent

facts and to see that they are adduced when parties have not put them in, and while agency must always act upon the record made, if that record is not sufficient, it should see that the record is supplemented before it acts.

Isbrandtsen Co. v. United States, 96 F. Supp. 883,
affirmed A/S J. Ludwig Mowinckels Rideri v. Is -
brandtsen Co., 72 S. Ct. 623, 342 U. S. 950, 96 L. Ed.
706 and Federal Maritime Bd. v. Unites States,
72 S. Ct. 623, 342 U. S. 950, 96 L. Ed. 706.

8 U. S. C. §1446(b) dictates that the examiner should take the testimony of witnesses and the petitioner. The examiner took the testimony of the government witnesses only. This was both unfair and a failure of due process.

POINT V

THERE WAS A FAILURE OF DUE PROCESS
WHEN A NECESSARY STEP IN THE ADMIN-
ISTRATIVE-JUDICIAL PROCESS WAS LEFT
OUT.

(a) 8 U. S. C. §1446 provides

"(c) The record of the preliminary examination upon any petition for naturalization may, in the discretion of the Attorney General be transmitted to the Attorney General and the recommendation with respect thereto of the employee designated to conduct such preliminary

examination shall when made also be transmitted to the Attorney General. "

The record is devoid of any showing that either the record or the recommendation was ever submitted to the Attorney General or that he ever exercised any discretion. May the employee who makes the recommendation also stand in for the Attorney General?

(b) 8 U.S.C. §1446 also provides:

"(d) The recommendation of the employee designated to conduct any such preliminary examination shall be submitted to the court at the hearing upon the petition and shall include a recommendation that the petition be granted, or denied, or continued, with reasons therefore. In any case in which the recommendation of the Attorney General does not agree with that of the employee designated to conduct such preliminary examination, the recommendations of both such employee and the Attorney General shall be submitted to the court at the hearing upon the petition, and the officer of the Service in attendance at such hearing, shall, at the request of the court, present both the views of such employee and those of the Attorney General with respect to such petition to the court . . ."

(Emphasis added)

No recommendation of the Attorney General can be submitted,

if the matter has never been submitted to the Attorney General for his recommendation!!

(c) The omission to include a recommendation of the Attorney General was not an oversight, but the procedure set out by the Commissioner. In the 1953 U. S. Code Congressional and Administrative News the procedure to be followed (and it obviously conflicts with the statute which places the duty on the Attorney General) is delineated:

"Admin. Regulations, Immigration and Nationality Act §335.12 . . . recommendation as to the final disposition of the petition by the court, and shall before final hearing, in those cases designated by the Commissioner submit the memorandum to him for his views and recommendation . . . The Commissioner shall return the designated examiner's memorandum, the record, and any memorandum prepared by the Commissioner containing his own views and recommendation for presentation to the court. "

The Commissioner, in adopting the rules, has substituted himself for the Attorney General for making a recommendation.

The Regulations continue:

§335.13 sub (c)

"Disagreement between recommendations of designated examiner and Commissioner. In those cases reviewed

by the Commissioner in which his views and recommendation do not agree with those of the designated examiner, the notice required by paragraphs (a) and (b) of this section shall also advise the petitioner of the recommendation of the Commissioner and that both recommendations will be presented to the court. There shall be enclosed with such notice a copy of the Commissioner's memorandum."

No notice of review or recommendation by the Commissioner was ever sent to the petitioner; and the record is devoid of any such recommendation or of any claim that such notice was sent to the petitioner. This runs contrary to the holding in Simmons v. United States, 348 U.S. 397, 75 S.Ct. 397. Continuing, the regulations state: §336.11:

" . . . In those cases in which the recommendation of the Commissioner does not agree with that of the designated examiner a member of the Service other than the person who conducted the preliminary examination shall, whenever practicable, represent the service before the court . . . "

§336.13 requires:

" . . . The Commissioner's list on Form N-492 or Form N-493, as appropriate, shall be signed by the district director . . . "

Finally, with reference to the procedure, §336.14 requires:

"Presentation of designated examiner's and Commissioner's

recommendation at final hearing. At the final hearing or prior thereto, in addition to the lists prepared under 336.13, there shall be presented to the court and made a part of the record in the case, the memoranda of the designated examiner and the Commissioner, prepared pursuant to provisions of Part 332 or Part 335 of this chapter. "

None of the procedures outlined was followed. The congressional mandate requires that the Attorney General review and supply a recommendation. The requirement of review by the Commissioner can only be an additional step; and both were ignored. Any form of regulation, no matter how slight its burden, must conform to the Act of Congress by virtue of which that regulation purports to be promulgated. United States v. Lehigh Val. Co-op. Farmers, 183 F.Supp. 80, reversed 287 F.2d 726, reversed 82 S.Ct. 1168, 370 U.S. 76, 8 L.Ed.2d 345. Administrative determinations must have a basis in law and must be within the grantor's authority, and it is a judicial function and not an administrative one to determine the limits of the statutory power. J.B. Montgomery, Inc. v. United States, 206 F.Supp. 455, affirmed 84 S.Ct. 884, 376 U.S. 389, 11 L.Ed.2d 797, rehearing denied 84 S.Ct. 1218, 377 U.S. 925, 12 L.Ed.2d 217.

Busey v. Deshler Hotel Co., 130 F.2d 187, 142 A.L.R. 563; United States ex rel. Hirshberg v. Malanaphy, 168 F.2d 503, revd. 69 S.Ct. 530, 336 U.S. 210; United States v. State of California, 67 S.Ct. 1658, 332 U.S. 19,

supplemented 68 S Ct. 20, 332 U.S. 804; Stark v. Wickard,
64 S.Ct. 559, 321 U.S. 288.

POINT VI

IT WAS ERROR TO ADMIT THE RECORD OF
THE EXAMINER'S HEARINGS, ESPECIALLY
SINCE IT INCLUDED THE HEARSAY LETTER

Counsel for the petitioner objected to the admission of the
record of the examiner's hearings (RT 121, 133, 211). It was ad-
mitted nevertheless. This was error. Stevens v. United States,
190 F.2d 880; Application of Murra, 178 F.2d 670.

Subsequent to the decision by the District Court, on a
motion for a new trial, the trial court stated that its decision was
not based upon the examiner's record (CT 78). The court had had
the record and the hearsay letter before it when making its decision.
Could the error be cured by the later statement in the order denying
the motion for a new trial?

POINT VII

CONGRESS INTENDED THAT THE EXAMINER
NOT ACT AS A PARTISAN IN THE COURT
HEARING WHICH IN EFFECT REVIEWS HIS
DECISION.

8 U.S.C. §1446(d) says:

"In any case in which the recommendation of the
Attorney General does not agree with that of the employee

designated to conduct such preliminary examination the recommendation of both such employee and the Attorney General shall be submitted to the court at the hearing upon the petition, and the officer in attendance at such hearing, shall, at the request of the court, present both the views of such employee and those of the Attorney General with respect to such petition to the court." (Underlining added)

Where Congress intrusts administrative agencies with broad control over activities which in their detail cannot be dealt with directly by Congress, Congress must determine the standards of administrative action, and in administrative proceedings of a quasi judicial character in carrying out such delegated authority, liberty and property of the people must be protected by fair and open hearing. N. L. R. B. v. Pettyman, 117 F.2d 786.

POINT VIII

IS PETITIONER TO BE TESTED BY EVERY PERSON TO WHOM HE TALKED; AND IS WHAT HE IS PURPORTED TO HAVE SAID ABSOLUTE AND BINDING.

The petition sets out a prima facie case for naturalization. Stasiukevich v. Nicolls, 168 F.2d 474. In addition petitioner testified to his attachment to the United States and to the Constitution. He stated in the petition and under oath that he would serve in the

military. The government witnesses testified that he had previously said he would not serve in the military. We come then to the question whether, even if he made those statements which he now denies, he is bound by those answers. Could any person who talks to him get an answer that he will not serve and make that so binding that he cannot thereafter serve? If the government witnesses say he said he would not serve, and the government asks him to serve, would he be precluded? The question seems to answer itself.

Moving to the next comment he is supposed to have made, which is one of the findings against him: Will he retire in Germany? Let us suppose he said to one person ten years back that he will retire in Germany; and to another he said in 1964 that he will retire in Germany; can he change his mind? Is he bound to retire in Germany? Or can he have found the United States so attractive that he not only wants to be a citizen, with his family, but he wants to retire in the United States? Can he change his mind? That question also seems to answer itself. In finding that he made those statements and he therefore is disqualified from becoming a citizen, the court was in error. The proof does not establish that when he made his petition he did not intend to reside in the United States permanently. Petition of Petcheff, 142 F. Supp. 494.

The inference that a prior adverse mental attitude continues into the statutory period, despite his sworn assertion that he has changed his views must be used with caution for otherwise the purpose of the statutory period is destroyed. . . . Nor does a refusal

to bear arms necessarily constitute a bar to naturalization.

Krausse v. United States, 194 F.2d 440; Giruoard v. United States,
328 U.S. 61, 66 S.Ct. 826; Cohnstaedt v. I. & N.S., 339 U.S. 901,
70 S.Ct. 516.

CONCLUSION

THE TRIAL COURT ERRED IN DENYING NATURALIZATION
AND THE CASE SHOULD BE REMANDED WITH INSTRUCTIONS
TO ADMIT APPELLANT TO CITIZENSHIP.

Respectfully submitted,

EDWARD RAIDEN,

Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Edward Raiden

EDWARD RAIDEN

APPENDIX

The testimony supporting the findings that Renner did not support the principles of the Constitution was given by two witnesses, Marinaccio and Whetzel. (Marinaccio Direct)

(151)

8. Well, well he had some real wild ideas about our form of government.
13. He thought there was many things about our government that he didn't like.
14. He thought it was better back home. He expressed this on many different occasions.
17. Back in Germany. He, especially in the beginning when I first knew him --
- 18, 19. I had to be fair in that respect -- when I first knew him, I mean he
20. was very outspoken about his feelings about his own country.
23. Well, he felt their way of doing things were a lot better than ours. In
24. other words, he didn't think that we had enough government control of
25. things over

(152)

1. here, things were done very loosely.
2. Q. Did he ever make any mention of his opinion with regard to Adolph Hitler. A. Yes.

A-1.

5. Q. What was that? A. He didn't think that the man had done anything wrong. In fact he thought he was a great man.
8. Q. Did he have anything to say with regard to his opinion of Nazism or National Socialism as practiced in the Third Reich?
11. A. We discussed this many times. I remember him telling me once that I just didn't understand what the problem had been there. I mean, he said,
13. you have to understand what the problem was in Germany after the first
15. World War and so on and so forth. He sort of vindicated everything that
17. they ever did by making excuses one way or the other.
18. Q. Did he ever at any time make any excuses for the mass extermination of the Jews? A. I don't think he ever really discussed that.
21. Q. What specific criticisms did he level at the Govern-
22. ment of the United
24. States, or the way the Government operates in the
24. United States?
24. Well, I guess it is just that the system that he was
24. brought up under - - I mean they didn't have the
- (153)
- freedom that they have here, and he
2. didn't quite agree that it was right at all times.

3. I mean it is specifically hard to evaluate what he did
say about this, that and the other thing, I mean, a
lot of these things were said many,
5. many years ago. But he definitely was very much
against a lot of the things that we did here.
19. Q. Insofar as his statements with regard to the United
States Government, or the Government of the Third
Reich, do you recall approximately when
22. the last time was that he expressed an opinion re-
garding any of these matters? A. Oh, within the
last four years, five years.

25. Q. Did he ever indicate to you that it was his

(154)

intention ultimately to return to Germany in order to
reside?

A. Like I say, I mean what his feelings are now I don't
know. I know years ago that he had mentioned this.
Whether he really meant it or not I don't

5. know. But he did voice the opinion to me but -- I
mean I always understood that he wanted to go back
to Germany.

8. Q. Within the past five years has he indicated this?

A. I can't say for sure if it was that late, but prior to
that definitely.

CROSS EXAMINATION

(159)

2. Q. Now, I believe you said that you and Mr. Renner discussed United States Government and Constitution of the United States.

.

17. Well, the first, first recollection . .

22. 1956 . . or 1957

(160)

8. Q. Yes. Exactly what did he say and what did you say about the Constitution of the United States?

13. A. Well, he didn't believe in the type of freedom that we have, basically.

15. Q. Specifically what type of freedom do we have that he didn't believe in?

17. A. He didn't believe -- he believed that actually a system was better when the government controlled it, which is what he said they had at home.

.

24. Q. Mr. Marinaccio, can you remember anything specifically that he said along that line at any time?

(161)

1. A. Not offhand, no.

5. A. There were different occasions when things were said, I mean exactly what were said I don't remember, no.

25. A. I believe I did say that he didn't say the things in the last few

(162)

years that he had said in prior years.

22. Q. Do you know the difference between the United States Government and that of the Hitler regime in Germany the difference in the type of Government?

25. A. I am not an expert, no.

(163)

2. A. I mean all I do know is one is a democracy and the other one is a dictatorship.

24. Q. Now, did Mr. Renner ever tell you that he didn't believe in free elections?

(164)

1. A. No.

2. Q. Did he ever tell you that he didn't believe in freedom of speech?

A. Never said it, no.

5. Q. Did he ever tell you that he didn't believe in the protection we have against self-incrimination?

A. I don't think it was ever discussed.

8. Q. Did he ever specifically tell you that he was opposed to any particular freedom that we have in the United States, under the Constitution of the United States?

11. A. Well, yes.

12. Q. Which one?

A. It is hard to pinpoint, but there were many, many things that did bother him about what we did and what they did.

16. Q. Is there anything that bothers you about what this government does?

A. I guess so, yes, true.

(176)

25. Q. I believe you did say, in answer to Mr.

(177)

1. Simpson's question, that you never heard Erich comment one way or the other on the mass extermination of the Jews by Hitler?

4. A. That's right.

5. Q. Now, specifically what did Mr. Renner, specifically what did he say that led you to believe that he thought -- if you did -- that he thought the Nazi regime or government, that he preferred that to our country? What specifically did he say praising that government?

11. A. It is kind of hard to try to pick up specific things that were said. I can't -- I mean I would only be guessing at half the stuff, I mean I don't remember anything specific that was said from time to time. We are talking about years ago now.

(184)

4. Q. Insofar as your association with Mr. Renner is concerned, did you at any time have occasion to, during your associations, to discuss with Mr. Renner anything with regard to the United States Government, or the Constitution of the United States?
12. A. There were many conversations, but one that I remember, he said that the American Government was too soft, and that the American people on the whole were stupid, that the Government that Germany had during the Second World War was not as bad as we were made out to be, --- these were his words -- that the people do need discipline, and this was a good government. If I had known the conditions after the first World War until Adolph Hitler took over I would realize that he wasn't such a bad man.
22. He gave me an example, when he was in Norway during the German occupation he went to a movie. And when the image of Adolph Hitler came on the screen the people began to hiss and spit and his answer -- his

(185)

1. words to me then were "Audrey, they shouldn't have done that, Adolph Hitler was not such a bad man."
7. Q. Did any of these conversations involve a discussion

A-7.

at any time of Mr. Renner's willingness to bear arms in defense of the United States, should he be required by law?

11. A. He told me on many occasions -- and one particular occasion took place in my home, his wife and my husband were present, and my two daughters -- and he said, "I would never fight for this country."

20. Q. Insofar as your conversations, or Mr. Renner's conversations are concerned, did he make any statements with regard to his intention to reside permanently in the United States?

24. A. In the day room at International Guiding Eyes Winifred Goff was present. And he said that he had

(186)

no intention of staying here all his life, that he was going to retire in Germany.

3. And when I asked him why was he here now, he said, "Strictly for the money."

8. Q. Insofar as any conversations now specifically with the Government of the United States is concerned, has he ever made any comments with respect to the two-party system?

A. He doesn't feel that either party is the right one.

(Objection sustained)

20. Q. What is it that he said, Mrs. Whetzel, in regard to the two-party system, in regard to his opinion, or

what you consider to be his opinion?

A. That neither one is the right one.

24. Q. Has he indicated by way of conversation that he prefers the Nazi form of government to the form

(187)

of government of the United States?

2. A. To me, yes. The fact that he claimed that Adolph Hitler was such a great man, and that the conditions that they lived in Germany were far superior to what they are here under our form of government.

CROSS-EXAMINATION

(194)

17. Q. Now, during this period of time did Mr. Renner make any remarks to you about what he thought of this nation, this country?

A. Mr. Renner not only made these remarks to me, but he made them in front of the other students, too, Winifred Goff, during the training.

(Winifred Goff was never called)

23. Q. That is not the question --

A. During the training.

Q. Mrs. Whetzel, did he make these remarks which you have stated about Hitler running a better government than the United States during that month you were training?

(195)

4. A. Not that particular statement in that particular way.
- Q. Well, what statement did he make during that period?
- A. He said that he would never fight for this country.
10. Q. He said that --
- A. He gave the instance that I described in Norway at this particular time.
- Q. Yes.
- A. And he also made the statement that he had no intentions of living here the rest of his life, that he would go back to Germany to retire, that he was here strictly for the money.

(201)

17. Q. oh, what did you say that caused Mr. Renner to make such a statement to you?
-
23. A. He was talking about his son joining the army. And he didn't have too much love for his boy -- in fact, the way I understood it the boy joined the army because he wanted to get away from home.

(202)

2. And I said, "Wouldn't you like to think that he has become an American citizen?" And he said, "Oh, yes."
5. I said, "Wouldn't you like to think that he has found a home here and he loves this country? Wouldn't

A-10.

you like to feel this way?" And he said, "I would never fight for this country. "

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS C. WHITE,

Petitioner-Appellant,

vs.

No. 22210

LAWRENCE E. WILSON, Warden,
San Quentin Prison, Tamal,
California,

Respondent-Appellee.

BRIEF OF APPELLEE

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

WILLIAM D. STEIN
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-2847

Attorneys for Appellee

FILED

FEB 23 1958

WM. B. LUCK, CLERK

MAR 1 1958

TOPICAL INDEX

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE CASE	1
A. Proceedings in the State Court	1
B. Proceedings in Federal Court	2
ARGUMENT	
I. IT WAS WITHIN THE DISTRICT COURT'S DISCRETION TO DENY APPELLANT'S APPLICATION FOR A WRIT OF HABEAS CORPUS WITHOUT REQUIRING HIS PERSONAL APPEARANCE.	3
II. APPELLANT'S ALLEGATION THAT COERCED AND INCRIMINATORY STATEMENTS WERE USED AGAINST HIM WAS INSUFFICIENT TO WARRANT RELIEF.	3
III. APPELLANT WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.	4
IV. THE DISTRICT ATTORNEY'S REMARKS CONCERNING APPELLANT'S PRIOR FELONY CONVICTION DOES NOT RAISE A FEDERAL QUESTION.	5
V. APPELLANT'S ALLEGATIONS THAT TRIAL COUNSEL RETAINED BY HIM WAS CONSTITUTIONALLY INEFFECTIVE ARE INSUFFICIENT TO WARRANT RELIEF.	7
VI. APPELLANT'S OTHER ARGUMENTS ARE EITHER WHOLLY LACKING IN MERIT OR ARE NOT PROPERLY BEFORE THIS COURT.	8
CONCLUSION	8

TABLE OF CASES

	<u>Page</u>
Arketa v. Wilson 373 F.2d 582 (9th Cir. 1967)	6
Brubaker v. Dickson 310 F.2d 30 (9th Cir. 1962)	7
Chapman v. California 386 U.S. 18 (1967)	3
Delano v. Crouse 327 F.2d 693 (10th Cir. 1964) <u>cert. denied</u> , 377 U.S. 1004	5
Dorsey v. Gill 148 F.2d 857 (D.C. Cir. 1965) <u>cert. denied</u> , 325 U.S. 890	5
Escobedo v. Illinois 378 U.S. 478 (1964)	3
Hodgdon v. United States 365 F.2d 679 (8th Cir. 1966)	5
Johnson v. New Jersey 384 U.S. 719 (1966)	4
Miranda v. Arizona 384 U.S. 478 (1964)	3
People v. White 212 Cal.App.2d 464 (1963)	7
Spencer v. Texas 385 U.S. 554 (1967)	6
Townsend v. Burke 334 U.S. 736 (1948)	5
United States v. Hayman 342 U.S. 205 (1952)	3
Vitoratos v. Maxwell 351 F.2d 217 (9th Cir. 1965)	7
Yeaman v. United States 326 F.2d 293 (9th Cir. 1963)	3

STATUTES

Calif. Stat. 1945, ch. 1006, p. 1943, § 2	6
Calif. Pen. Code § 3024(c)	6

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUIS C. WHITE,

Petitioner-Appellant,

vs.

No. 22210

LAWRENCE E. WILSON, Warden,
San Quentin Prison, Tamal,
California,

Respondent-Appellant.

BRIEF OF APPELLEE

JURISDICTION

The jurisdiction of this Court to entertain this appeal from the United States District Court's denial of appellant's petition for writ of habeas corpus is conferred by Title 28, United States Code, section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Court

Appellant, Louis C. White, was convicted after trial in the Superior Court of the State of California for the County of Alameda of assault with a deadly weapon. On February 16, 1962, he was sentenced to state prison for the term prescribed by law.

On Friday, November 3, 1961, appellant was arrested and charged with attempting to murder his wife the previous

Tuesday (October 31, 1961). He was taken before a magistrate and arraigned the following Monday (November 6, 1961). Following a preliminary hearing in the municipal court appellant was held to answer on an information charging him with assault with intent to commit murder and assault with a deadly weapon. He was arraigned on this information December 14, 1961, and by consent the cause was continued to January 22, 1962, for trial.

An appeal from the judgment of conviction was taken to the Court of Appeal for the First Appellate District. On January 29, 1963, Division Three of that court affirmed the judgment in an opinion which is reported at 212 Cal. App.2d 464.

B. Proceedings in Federal Court

On January 9, 1967, appellant filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division, Case No. 46283. An order to show cause was issued and appellee, respondent below, filed a return to that order on February 14, 1967. Appellant filed a traverse to appellee's return on February 24, 1967.

On April 26, 1967, the District Court denied the petition for writ of habeas corpus, discharged the order to show cause, and dismissed the proceedings.

On August 25, 1967, a certificate of probable cause was issued by the Honorable Alfonzo J. Zirpoli, Judge of the United States District Court for the Northern District of

California, Southern Division. On September 11, 1967, a notice of appeal was filed.

ARGUMENT

I.

IT WAS WITHIN THE DISTRICT COURT'S DISCRETION TO DENY APPELLANT'S APPLICATION FOR A WRIT OF HABEAS CORPUS WITHOUT REQUIRING HIS PERSONAL APPEARANCE.

The mere fact that the district court has the power to order a prisoner produced in a habeas corpus proceeding does not mean that he should be automatically produced in every such proceeding. United States v. Hayman, 342 U.S. 205 (1952). Since the merits of appellant's application for a writ of habeas corpus could be determined on the record before the court, neither a hearing nor the presence of appellant was required. Yeaman v. United States, 326 F.2d 293 (9th Cir. 1963).

II.

APPELLANT'S ALLEGATION THAT COERCED AND INCRIMINATORY STATEMENTS WERE USED AGAINST HIM WAS INSUFFICIENT TO WARRANT RELIEF.

Appellant alleged that he was interrogated by police officers using coercive methods after he had requested the presence of counsel.

The conviction appellant is attacking here resulted from a trial which occurred in 1962, long before the effective date of the prospective application of the rules announced in Escobedo v. Illinois, 378 U.S. 478 (1964), and

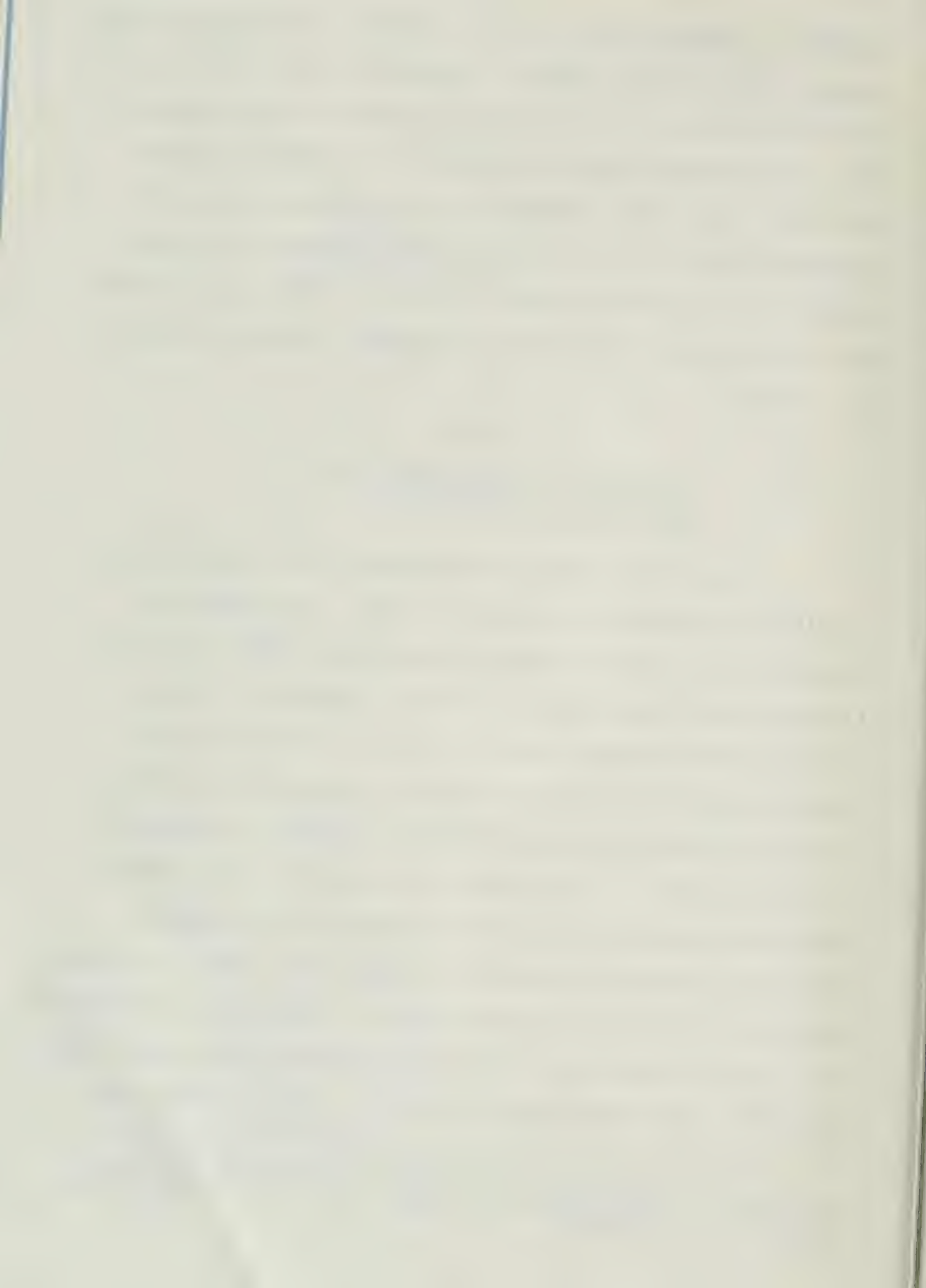
Miranda v. Arizona, 384 U.S. 436 (1966). See Johnson v. New Jersey, 384 U.S. 719 (1966). Furthermore, the record of the trial, which was lodged with the district court, indicates that no statements were introduced into evidence against appellant. The sole reference to any statement given by appellant was elicited from Inspector Anderson by defense counsel on cross-examination (RT 103).^{1/} After ascertaining that the Inspector had taken a statement, counsel dropped the issue.

III.

APPELLANT WAS NOT DENIED HIS
CONSTITUTIONAL RIGHT TO A
SPEEDY TRIAL.

The crime for which appellant was convicted was committed on Tuesday, October 31, 1961. Appellant was arrested the following Friday, November 3, 1961. He was taken before a magistrate on Monday, November 6, 1961, at which time bail was set in the amount of \$3,150.00. This was later increased to \$8,150.00 upon motion of the district attorney due to petitioner's previous conviction of manslaughter. A preliminary hearing was held in this matter and appellant was held to answer in the superior court where he was arraigned on December 14, 1961. At that time, with the consent of appellant's counsel and the prosecution, the case was continued to January 22, 1962, when trial commenced. Appellee submits that the record in this case

1. "RT" refers to Reporter's Transcript of the proceedings at trial heretofore lodged with the District Court for its consideration.



does not show an unreasonable delay which would warrant a finding that petitioner's constitutional right to a speedy trial had been infringed. Compare, Delano v. Crouse, 327 F.2d 693 (10th Cir. 1964), cert. denied, 377 U.S. 1004.

Even if the record did show an unreasonable delay appellant has made no allegations that he was prejudiced thereby and hence did not state sufficient grounds for relief in habeas corpus. See Townsend v. Burke, 334 U.S. 736 (1948); Dorsey v. Gill, 148 F.2d 857 (D.C. Cir. 1965), cert. denied, 325 U.S. 890.

Appellant's contention that he was held under excessive bail is without merit for the same reason - i.e., failure to allege in what way he was constitutionally prejudiced thereby. Furthermore, in light of the seriousness of the offense charged and appellant's prior record it cannot be said that the bail of \$8,150.00 was excessive. The mere fact that appellant may not have been able to pay the bail does not make it excessive. Hodgdon v. United States, 365 F.2d 679 (8th Cir. 1966).

IV.

THE DISTRICT ATTORNEY'S REMARKS
CONCERNING APPELLANT'S PRIOR FELONY
CONVICTION DOES NOT RAISE A FEDERAL
QUESTION.

The charging of a prior felony conviction does not raise a federal question. The record does not support appellant's allegation that the prior conviction was a product of a coerced plea of guilty. In fact, the record amply estab-

lishes that it was not. It is clear from the record that appellant was represented by counsel at all critical stages of the 1946 proceeding and appellant's counsel represented to the court that he was satisfied that there had been no mistreatment. See Exhibit "D",^{2/} page 2. The record also contains appellant's confession of guilt which was obtained after informing him that anything he said would be used against him at trial, and that he need not give a statement unless he wanted to. Appellant himself acknowledged in the statement that it was given freely, voluntarily, and of his own free will. See Exhibit "E", pps. 1, 2.

Furthermore, even if appellant's prior conviction was a result of a coerced plea it has no force and effect upon his present incarceration. The maximum sentence for a conviction of manslaughter in 1946 was 10 years. Calif. Stat. 1945, ch. 1006, p. 1943, § 2. The effect of this prior conviction upon appellant's 1962 conviction was to raise the minimum term he had to serve for that offense to two years. Calif. Pen. Code § 3024(c). Therefore, appellee submits that the charging of the prior conviction in this case raises no federal question, Spencer v. Texas, 385 U.S. 554 (1967), at this time and is without force or effect upon appellant's incarceration. Compare, Arketa v. Wilson, 373 F.2d 582 (9th Cir. 1967).

2. All exhibits refer to those attached to appellee's Return to Order to Show Cause filed below on February 14, 1967.

APPELLANT'S ALLEGATIONS THAT TRIAL COUNSEL RETAINED BY HIM WAS CONSTITUTIONALLY INEFFECTIVE ARE INSUFFICIENT TO WARRANT RELIEF.

Appellant maintains that he was inadequately represented by counsel at the sentencing phase of his trial due to counsel's candor in indicating to the court that he felt appellant should serve some period of imprisonment for the crime.

A review of the record lodged with the District Court and of the opinion of the California Court of Appeal in People v. White, 212 Cal.App.2d 464 (1963), compels a conclusion that appellant received able representation of counsel at trial.

Appellee submits that since the role of counsel at the sentencing proceeding is somewhat different than that at trial, and in light of appellant's prior record his conviction of a serious offense, and California's indeterminate sentence law, it cannot be said that this statement is evidence of constitutionally ineffective representation. Compare Vitoratos v. Maxwell, 351 F.2d 217, 223 (6th Cir. 1965); and Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962). Furthermore, in light of the circumstances enumerated above, even if counsel's statement was improper it was harmless error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).



APPELLANT'S OTHER ARGUMENTS ARE EITHER
WHOLLY LACKING IN MERIT OR ARE NOT
PROPERLY BEFORE THIS COURT.

Appellant argues in his opening brief that the trial court's instructions to the jury upon lesser included offenses was improper, that the trial court submitted improper verdict forms to the jury, and that he was denied due process because he was tried for a greater offense than that for which the jury convicted him. The latter two of these allegations were not raised in the district court and are therefore not properly before this Court on an appeal from that court's denial of his petition for a writ of habeas corpus. The former allegation of improper instructions has never been presented to the state court and appellee submits that so patently lacking in merit as to require no extended discussion.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the order of the district court denying appellee's petition for writ of habeas corpus should be affirmed.

DATED: February 16, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

WILLIAM D. STEIN
Deputy Attorney General

Attorneys for Appellee

WDS:lp
24CRSF
66-710

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: February 16, 1968

WILLIAM D. STEIN
Deputy Attorney General

No. 22215✓

United States
COURT OF APPEALS
for the Ninth Circuit

JACK D. HOUGHTON,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

BRIEF FOR THE APPELLANT

Appeal from the Tax Court of the United States

FILED

JAN 24 1968

WM. B. LUCK, CLERK

WARDE H. ERWIN,
3323 S. W. Harbor Drive,
Portland, Oregon,
Attorney for Appellant.

SUBJECT INDEX

	Page
Jurisdiction	1
Statement of the Case	2
Specification of Errors:	
I.	4
II.	4
III.	5
Argument:	
Summary	6
Specification of Error I	9
Points and Authorities	9
Argument	11
Specification of Error II	36
Points and Authorities	36
Argument	37
Specification of Error III	43
Argument omitted	
Conclusion	41
Appendix A—Public Law 89-332	45
Senate Report 755	46

INDEX OF AUTHORITIES CITED

	Page
CASES	
Arlington Corp., 183 F.2d 448	10
Birnie v. Commissioner, 16 T. C. 861 (1951)	24, 25
Boren v. Riddell (CA 9, 1957) 241 F.2d 670	10
Clement Brzezinski, et al v. Commissioner, 25 T. C. 192 (1954)	24
Cohen v. U. S. (CA 9, 1962) 297 F.2d 970	10, 18, 25
D'Andrea v. Comm. (CADC, 1959) 263 F.2d 904	10, 23
Denman v. Commissioner, 35 T. C. 1140	42
Draper Allen, et ux v. Commissioner, 29 T. C. 113 (1957)	24
Eppler v. Comm., 188 F.2d 95	10, 20
Exchange & Savings Bank of Berlin v. U. S., 226 F. Supp. 56	36
Hurd, T. C. 1947	25
Johnson v. Commissioner, 207 O.T.C. Adv. Sh. 521	36
Joseph Delman, T. C. Memo (CA 3) (App. 4-21- 66)	25
Marjorie F. Birnie v. Commissioner, 16 T. C. 861 (1951)	24
Mary Jo Williams, Adm. v. U. S. (1959) 264 F.2d 227	24
Nathanial A. Denman, 35 T. C. 1140	42
Parker, T. C. 1949	25
Robbins v. U. S., 21 F. Supp. 403	36
Rosewood Hotel, Inc. v. Commissioner, 275 F.2d 786	26
Schildhaus v. Moe (CA 2, 1963) 319 F.2d 587	10
Schuster v. C.I.R. (CA 9, 1962) 312 F.2d 311	36
Simmons v. U. S. (CA 5, 1962) 308 F.2d 938	36
Stearns v. U.S., 291 U.S. 54, p. 61	35

SUBJECT INDEX (Cont.)

	Page
Stewart v. Commissioner (CA 6, 1951) 186 F.2d 239	10, 25
Tenzer v. Commissioner (CA 9, 1962) 285 F.2d 670	10, 18, 25, 26, 27, 28, 41
U. S. v. Lehigh (DC ARK 12-28-61) 201 F. Supp. 224	10, 18, 28
Williams v. U. S. (CA 6, 1959) 164 F. Supp. 874 Affirmed, 264 F.2d 227	10, 24, 25
Williams v. U. S. F. & G., 236 U.S. 541	41

STATUTES

Public Law 89-332 (5 U.S.C. 1012, 1013, 5 U.S.- C.A. 500 ..4, 5, 7, 10, 36, 37, 38, 40, 41, 42, App. 44	
Internal Revenue Code 1954 § 6212 ..4, 9, 18, 24, 38, 42	
United States Code:	
Title 26, § 7482	1
Title 26, § 6213	2, 42
Title 26, § 6212	4, 9, 37, 40, 42
Title 26, § 1012	4, 5, 7, 8, 10
Technical Information Release 854	21
Regulation 601, 504 (5) (ii)	22
Revenue Procedure	23
Oregon Revised Statutes:	
9.160	39
9.220 (32)	39
41.360 (32)	20
41.360 (33)	39
Senate Report 755	37, 41
Appendix	45
House Report 1141	37

United States
COURT OF APPEALS
for the Ninth Circuit

JACK D. HOUGHTON,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

BRIEF FOR THE APPELLANT

Appeal from the Tax Court of the United States

JURISDICTION

This action was commenced in the Tax Court of the United States as a claim for review of the statutory notice of deficiency in income tax.

Such review is authorized by 26 U.S.C. 7482.

The Tax Court allowed a motion for summary judgment of dismissal for lack of jurisdiction.

Petitioner requests a review of such determination. This Court has jurisdiction to determine that matter under 26 U.S.C. 7482.

STATEMENT OF THE CASE

There is only one question raised upon this review, to-wit:

Did the Tax Court of the United States err in determining that it did not have jurisdiction to determine the accuracy of a proposed deficiency in income taxes on the ground that the petition of taxpayers was not filed within 90 days of the mailing of a Notice of Deficiency?

The basis of the Tax Court's allowance of the Motion for Summary Judgment for lack of jurisdiction was that the petition was filed more than 90 days after the mailing of a Notice of Deficiency (Ref. Title 26 U.S.C. Sec. 6213 (a), (I.R.C. 1954).

It is conceded that the Section last above quoted requires filing of a petition within 90 days following a proper mailing of a Notice of Deficiency.

However, petitioners contend that the Notice of Deficiency which taxpayers seek to review (1) was not sent to the taxpayers' *last known address*, (2) that a copy of the Notice should have been sent to the attorney for petitioners, and (3) that the District Director abandoned his attempted service by mail by subsequently serving a copy on the attorney for taxpayers, and that the petition was filed within 90 days of the receipt of actual knowledge of the Notice of Deficiency.

It is undisputed that taxpayers did not ever, at

any time receive personally a Notice of Deficiency. The only Notice ever mailed was a 90-day letter, and that letter was returned to the Internal Revenue Service without delivery (Tr. 48).

It is undisputed that the Internal Revenue Service had in its possession at all pertinent times a signed Power of Attorney appointing Warde H. Erwin as attorney, and an adequate address to insure actual notice (Tr. 47).

It is undisputed that previous dealings had been held between Internal Revenue Service, and the designated attorney regarding the same claim.

It is undisputed that the internal records of the Internal Revenue Service disclose that a Power of Attorney had been received, and that copies of all correspondence were directed to be sent to the attorney named, but that no copies were ever sent or received by the attorney; hence neither the taxpayers nor their attorney were advised of the Notice of Deficiency and that as a result, the attorney billed the taxpayer and closed his file (Tr. 48).

It is also undisputed that the court has held that none of the foregoing undisputed facts gives the taxpayer a right to have his determination reviewed by the court for the following reasons:

1. It makes no difference that the notice was not received, since it was sent to the taxpayers' residence, and the letter carrier says he left a yellow slip in the rural mail box of taxpayers and "shut the door."

2. That it makes no difference that dealings had been had with the attorney relative to the matter or that a signed Power of Attorney was on file, and that the Internal Revenue Service was not obliged to send any notice to the attorney.

It makes no difference that Public Law 89-332 (5 U.S.C. 1012, 1013; 5 U.S.C.A. 500) requires Notice to be sent to an attorney when the party is so represented.

The question of jurisdiction of the tax court was raised by a defendant filing a motion for summary judgment for lack of jurisdiction followed by a hearing as to whether or not a proper Notice had been sent and whether or not a period in excess of 90 days had elapsed after said Notice (if properly sent) before a petition for review was filed in the tax court (Ref. Title 26, Section 6212).

SPECIFICATIONS OF ERROR

I

The Court erred in finding that the Notice of Deficiency was sent to petitioner at his *last known address* pursuant to Section 6212 I.R.C. 1954 (Tr. 69) for the reason that taxpayers had been divorced and had notified the District Director of other addresses, including that of his attorney.

II

The Court erred in finding that the provisions of

P. L. 89-332, (5 U.S.C. 1012 and 1013; 5 U.S.C.A. 500) does not require notice to the taxpayers' attorney because petitioners' attorney did not file with Internal Revenue Service a declaration that he is a member in good standing of the Bar of any state, and in further finding that even if a sufficient declaration was filed, that provisions of the law did not effect the validity of Notice sent to petitioners whether received or not and that the Statute did not make it mandatory to send a copy of the Notice to the attorney (Tr. 69).

The error of the Court was in overruling Petitioners' contentions that the sections of the law (5 U.S.C. 1012 and 1013; 5 U.S.C.A. 500) (P. L. 89-332) does make mandatory the sending of notice to an attorney who appears for a client before the Internal Revenue Service and for the further reason that statements and law applicable were sufficient to constitute a declaration of membership in the bar in good standing.

Further, for the reason that by dealing with the attorney, the respondent is estopped to question his authority.

III

The Court erred in holding that the petition was not timely filed for the reasons that the petition was filed promptly after the petitioners received notice that a "deficiency" was being claimed, and in failing to find that the District Director abandoned his attempted service by mail by forwarding the same to

the attorney upon discovery that no notice had been given to the attorney.

ARGUMENT

Summary

This matter factually is not in substantial dispute.

The effect of the Court's holding is to defeat the taxpayer's right to a review of an additional income tax assessment of which assessment the taxpayers had no notice, and further had no notice that a claim had ever been made until final assessment was received.

There is no dispute that had a copy of the Notice of Proposed Deficiency been sent to the attorney, the Petition for Review would have been promptly filed, and the taxpayers' rights would have been protected as shown by the Congressional intent of the Statute.

The respondent seeks to avoid the effect of lack of notice to the attorney on these grounds:

1. That under the Power of Attorney, respondent was only obliged to send a "copy" to the attorney, and that failure to do so did not affect the fact that the notice was sent to the residence address of taxpayers.

2. That the Power of Attorney was not notarized, even though the Director's office had recognized its validity by negotiations and discussing the case over a substantial time, and even though its own internal directives had acknowledged its validity, made no complaint for "incompleteness," held it for many

months, and only used lack of notarization as an excuse after taxpayers' attorney had inquired as to how an assessment could have been levied without first sending a notice of any kind. (No 30-day notice was ever sent in this case, as is customary.)

3. That P. L. 89-332 (5 U.S.C. 1012 and 1013; 5 U.S.C.A. 500) did not apply to the Internal Revenue Service, and that the provisions of that new law did not alter the provisions of Section 6212 of the Internal Revenue Code which respondent claims merely required notice to the taxpayers' last known address, whether or not he was represented by an attorney and then even if the law did apply to the Internal Revenue Service, that a statement of the attorney that he was an attorney in good standing was not furnished.

The petitioners contend:

1. That when a Power of Attorney was filed on printed forms furnished by the taxpayers, and the Internal Revenue Service knew that it was the intent of the taxpayers that all matters would be thereafter handled by the attorney that:

a) The Government would be estopped to deny its responsibility to send a copy of any document to the attorney and could not merely ignore the instructions by sending the original to the taxpayers and ignoring the mandate of the Power of Attorney to furnish a copy to the attorney.

b) The Government's argument to the effect that since it was required to send the "original" to the taxpayers that failure to send a "copy" to

the attorney did not affect the validity of the service was not sound, since it would permit the Power of Attorney to be ignored at the pleasure of the Service.

2. That when a Power of Attorney has been received and accepted as valid and negotiations are conducted with the attorney pursuant to its authority, lack of notarization can be waived and is not even required if signed by an enrolled attorney (enrollment not required since P. L. 89-332). (A fully notarized copy was inadvertently retained in the attorney's files and would have been immediately substituted if the deficiency had been called to the attorney's attention.) (Tr. 47).

3. That Public Law 89-332 was intended to correct the very abuse which occurred in this case (the intent to deprive taxpayers of their rights to have an income tax claim reviewed rather than to *assure* proper notice and opportunity to be heard).

By its terms P. L. 89-332, (5 U.S.C. 1012 and 1013; 5 U.S.C.A. 500) *requires* that notice shall be given by all public agencies to a lawyer when he notifies them of his representation, and had such a notice been sent this problem would not have arisen.

The taxpayers feel that the Court's adoption of the Government's position is improper and that it erred in adopting the Government's argument, in toto and substantially verbatim.

SPECIFICATION OF ERROR NO. 1

The Court erred in finding that the Notice of Deficiency was sent to Petitioner at his last known address pursuant to Section 6212 (I. R. C. 1954) (Opinion, p. 2) for the reason that the taxpayers had been divorced and had notified the District Director of other addresses.

Points and Authorities

1. Section 6212, I.R.C. 1954 (26 U.S.C. 6212) requires that a Notice of Deficiency be sent to taxpayer at his last known address.

Section 6212 (b) insofar as it is applicable states as follows:

“(b) address for Notice of Deficiency

“(1) Income and gift taxes—in absence of notice to the secretary or his delegate under Section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect to a tax imposed by sub-title A or Chapter 12, if mailed to the taxpayer at his last-known address shall be sufficient for purposes of sub-title A, Chapter 12, and this chapter even if such taxpayer is deceased, or is under legal disability, or, in the case of a corporation, has terminated its existence.

“(2) Joint income tax returns—in the case of a joint income tax return filed by both husband and wife, such notice of deficiency may be a single joint notice except that if the secretary or his delegate has been notified by either spouse that separate residences have been established, then, in lieu of a single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last-known address.”

2. "*The last-known address*" of a taxpayer means "last" and "known" and that means "last" and "known" to the District Director from information in his files or readily available to him by cursory inquiry, and he can not ignore information in his own file relative to insuring improper notice to taxpayer.

U. S. v. LeHigh, (DC Ark 12-28-61) 201 F. Supp. 224.

Stewart v. Commissioner, (CA 6 1951) 186 F.2d 239.

Williams v. U. S., (CA 6 1959) 164 F. Supp. 874 affirmed 264 F.2d 227.

D'Andrea v. Comm., (CADC 1959) 263 F.2d 904.

Boren v. Riddell, (CA 9 1957) 241 F.2d 670.

Schildhans v. Moe, (CA 2 1963) 319 F.2d 587.

Eppler v. Comm., 188 F.2d 95.

Arlington Corp., 183 F.2d 448.

3. The intent of the legislature is to assure that a taxpayer receives notice of a claimed deficiency in order that he may petition his government if he so desires.

U.S. v. Lehigh, (USDA W. Dist. Ark. 1961) 201 F. Supp.

Boren v. Riddell, (CA 9 1957) 241 F.2d 670.

Tenzer v. Commissioner, (CA 9 1962) 285 F. 2d 965.

Cohn v. U. S., (CA 9, 1962) 297 F.2d 970.

P.L. 89-332 (5 U.S.C. 1012 and 1013; 5 U.S. C.A. 500).

Argument

The Tax Court assumes in its opinion that the "last known address" of the taxpayer was the address to which a notice of deficiency was mailed.

It arrives at this conclusion for the following reasons according to its opinion:

1. Petitioner resided at the address to which a notice was mailed from 1957 to 1961 when he was divorced (Opinion, p. 7, Tr. 74).

2. Although he left that address for intervals in 1961, he has resided at that address since 1962 (Opinion, p. 7, Tr. R. 74).

a. In support of the above conclusion, the Court states:

1. Petitioner used that address as a mailing address to receive mail from his attorney;

2. That address was used upon income taxes.

3. The address was used upon some (but not all) consent forms extending the period of limitations for assessment.

4. Powers of Attorney used that address.

5. That address was used as an address for the purpose of stating residence in a petition to this Court.

6. That the petitioner never requested or directed any agent of respondent to change his address from 6325 S. W. Alfred Street, Portland, Oregon, to any other address.

Petitioner contends that the facts stated as supporting the conclusion do not in fact support that determination for the following reasons:

STATEMENT 2(a)1:

The address was used by his attorney to correspond with taxpayer.

When the determination is to be made as to whether the Commissioner used the correct address, the fact must be inquired into as of the time of the mailing of Notice of Deficiency and whether or not he used the address "known to him" to be the address best calculated to insure reception by the taxpayer *at that time*.

Whether or not a particular address was used by petitioner to receive mail from his attorney was (1) neither known to the District Director in June, 1966, (the date of mailing the Notice of Deficiency); (2) nor prior to the hearing on the motion to dismiss.

The attorney was not appointed until March 17, 1966, (Exhibit H, Tr. 36), and there is no evidence whatsoever to show that the District Director's file contained any information to the effect that the address used to mail the Notice was the address used by the attorney to correspond with petitioner.

While the fact may be true, the point is here made that the record is silent that the District Director could have relied on that fact in determining where to send the "notice" in order to best assure notice because it was not known to him at the time he sent the notice.

The fact therefore, whether true or untrue, is not supported by any evidence except the testimony of the petitioner at the time of the trial of this case on April 17, 1967.

STATEMENT 2(a)2:

The address was used on income tax returns.

It is believed that this may be evidence of a mailing address, but the use of an address on a current tax return is scarcely entitled to very great weight, since it is probable that the average taxpayer is many times not even aware of the address used in his returns when prepared by someone other than himself (here, Cascade Accounting Service) (Tr. Vol. II, 76).

It is even more certain that the agent (Carrier) who actually instituted the Notice, never even looked at those returns for the purpose of determining the address and current returns were surely not intended as an "address for a Notice of Deficiency" should such notice be sent some time in the future. There is absolutely no testimony from anyone from the District Director's office of what documents (if any) were consulted in order to secure the address for mailing the Notice of Deficiency.

In fact, all tax returns did not use that address (Tr. Vol. II, 75).

STATEMENT 2(a)3:

The address used upon some forms which granted the Government an extension of the period of limita-

tions contained the address used for mailing the Notice of Deficiency.

That some of said forms did contain such an address can not be disputed, but there are two things wrong about placing any reliance on that fact.

1. The address was not placed there by the taxpayer, but rather was typed there by a revenue agent who handed the form to taxpayer's ex-wife who later handed them to taxpayer with instructions to sign and return (taxpayers were not represented by counsel at those times) (Tr. Vol. II, 34, 47) (Ex. 2, Tr. Vol. II, 77) (Tr. Vol. II, 115).

2. Taxpayer did change an address on one of the forms, and the agent knew that he was not available and out-of-town; (Tr. Vol. II, 47) that the agent never at any time contacted Jack Houghton at the address used to mail the Notice of Deficiency and never sent extension forms or any of them to that address (Tr. Vol. II, 33-34).

In fact, the agent once sent one Form 872 to Jack Houghton at an apartment, (Tr. Vol. II, 34) and another time one of the consents contained another address (Tr. Vol. II, 115, Ex. 2).

STATEMENT 2(a)4:

The address used for mailing the Notice of Deficiency was the same as that on the Power of Attorney filed with the District Director.

The things that are wrong with this fact are (1)

the respondent claims that this Power of Attorney was void because not notarized (not good enough to constitute a Power of Attorney and used as an excuse not to send copies of the Notice to the attorney in spite of an "internal directive" to do so), but apparently desire to recognize it insofar as it constitutes an address for petitioner to which a Notice of Deficiency could be sent; and (2) there was no testimony that the address used on the Power of Attorney was relied upon for the mailing of the Notice of Deficiency.

The fact is that the agent (Carrier) testified that he had completed his report and sent it to review before he ever had any knowledge of the existence of the Power of Attorney (Tr. Vol. II, 39-43) and he therefore had apparently used a different source from which to complete his report.

It would seem that if respondent relies on the address contained in the Power of Attorney that it must rely on its directives as well to send copies to the attorney.

STATEMENT 2(a)5:

That address was used as an address for the purpose of stating residence in a petition to the Court.

It is obvious, since this petition was filed long after the mailing of Notice of Deficiency in June, 1966, that the District Director did not have the petition in his file at the date of mailing and could not have relied upon it to support the address used as the

“last known address” of petitioner “at the time of mailing.”

It can thus be seen that each of the matters assigned as a basis for the conclusion that the taxpayer's “last known address” was that used to mail the Notice of Deficiency, fails when examined in the light that either they were not facts in existence at the time of mailing or not relied on or of such a nature as to raise serious doubts as to reliability to insure delivery at that time.

STATEMENT 2(a)6:

That the petitioner never requested or directed any agent of respondent to change his address from 6325 S. W. Alfred Street, Portland, Oregon, to any other address.

The argument is cited to support the Court's conclusion that the address was the last known address of taxpayer, Jack Houghton.

It is fallacious in that there is no evidence that Houghton ever asked any agent of respondent to send any mail to that address at any time and further fallacious in that no mail was ever sent to him previously at that address. Why then would he ever ask that his mailing address be changed and of what significance is such a statement in supporting the Court's conclusion?

FACTS TO SHOW DOUBT:

1. Taxpayer had been divorced (Ex. 5) (Tr. Vol. II, 78) (Tr. Vol. II, 85, 110-113).

2. Taxpayer filed separate returns.

3. Wife's separate returns after divorce carried a different address from that of her ex-husband, and a different address from that contained on numerous extension Forms 872 typed by the revenue agent and presented for signature of both taxpayers (Tr. Vol. II, 104).

4. Husband had given several different addresses and had not changed addresses after such notice (Tr. Vol. II, 33, 75, 76, 77, 98, 102, 108, 115) (Tr. Vol. II, 62).

The revenue agent who prepared the deficiency notice knew that one of the taxpayers could not be reached and was away for an extended period of time, and therefore, never mailed such extension forms to him at the address used for the notice (Tr. Vol. II, 34).

6. That no correspondence of any kind was ever mailed to him at that address used for mailing of deficiency notice (Tr. Vol. II, 85-105).

7. That no person in the District Director's office ever testified that at any time were any of the facts (relied upon to support the Tax Court's conclusion) used to assure a correct mailing address.

8. That other addresses were available as the last-known address of taxpayers in the file of the District Director or readily available by a simple inquiry (Tr. Vol. II, 37, 55, 58).

9. That the agent had been told to contact the at-

torney for all information (Tr. Vol. II, 90, 99).

10. Use of certified mail requires personal delivery by mailman in order to secure a signature and where it is known that taxpayers were not at home during delivery hours the use of a residence address is not a last-known address when other addresses where delivery can be secured are known to the District Director.

The Tax Court's emphasis has been primarily on the "residence" of the taxpayer.

The statute, however, does not use the term "residence."

Section 6212 uses the term "last-known address." It does not use the term "last-known residence address."

The distinction is important because it supports the congressional intent as this Court found in *Tenzer v. Commissioner*, 285 F.2d 956, and the Arkansas Court found in *U.S. v. Lehigh*, 201 F. Supp. 224, and this Court's later approval in *Cohen v. U. S.*, 297 F.2d 760, which intent was to assure notice to the taxpayer so that his right to review would be protected.

It would thus seem reasonable to assume that the District Director would be required to use at least the information in his files which would lead him to an address (not necessarily a residence address) at which it would be probable the notice would be received.

Reduced to its simplest terms, the evidence dis-

closes a divorce, conflicting addresses, the filing of separate tax returns using separate addresses, no mail from the District Director ever having been sent to the address used, a notice to the agent to forward documents to the attorney, a signed Power of Attorney appointing a practicing attorney as his agent of one of the taxpayers, an internal memorandum to deal with the attorney.

There is little conflicting evidence in this case. Assuming the truth of all statements, the record discloses that addresses in the file of the District Director disclosed (at the time of mailing the Notice) several different addresses for the taxpayers over a period of many years during which time numerous extensions were given to the District Director for his convenience.

Only one addresses in the District Director's files should constitute a mutual (both Mr. and Mrs. Houghton) and current address, to-wit: the address of the attorney. It was and is the "last-known address" of both taxpayers.

The District Director chose to ignore the plain and unambiguous intent expressed by the direction of that Power of Attorney and the intent of P. L. 89-332.

Notice to Patricia Houghton could not be predicated on notice to the same address as that to Jack Houghton since the taxpayer had notified the Internal Revenue Service of a change of address (Tr. 104-105), and by the law of the State of Oregon, there is

a rebuttable presumption that a thing once proved to exist continues to exist (ORS 41.360 (32)).

The District Director chose to ignore the designation, and the direction of that Power of Attorney.

The Tax Court made one observation (Tr. 78) which in part states:

“The problem involved herein probably could have been entirely avoided . . . if the respondent had notified Erwin that the Power of Attorney was regarded as incomplete.”

Even that is extremely doubtful because the internal directives admonish that copies of all correspondence should be sent to the attorney but the internal directive itself was ignored.

So, the “incompleteness” of the Power of Attorney had nothing to do with the lack of notice.

Any defense of incompleteness of the Power of Attorney was a pure after-thought generated by the attorney’s inquiry as to how an assessment could be entered without “any” notice (Tr. 48, Ex. G).

But it is undisputed that the “Power of Attorney” and the internal directives were ignored.

As stated in the case of *Eppler v. Commissioner*, (C.A. 7, 1951) 188 F.2d 95:

“The Commissioner should not be permitted to defeat the purpose of the remedial statute by so misleading the taxpayers. Congress intended that the taxpayer should be given his right of appeal only to correct possible errors of the Com-

missioner in determining the amount of the deficiency."

The petitioner and his attorney could not help but regret the accidental filing of a power of attorney form without notarization but this omission was scarcely the cause of the difficulty, since the respondent contends (and the tax court agrees) that it could ignore even a fully-executed Power of Attorney without affecting the validity of the notice of deficiency (Tr. 79) and that the sending of notice to the attorney was a pure courtesy.

Nor, is a notarization of a power of attorney necessary to the validity of the power of attorney if the form is certified by an enrolled attorney (Ex. H, Tr. 36).

Technical information Release 854, Advance Revenue Procedure, 66-44, I. R. B. 1966-42 states as follows:

"Sec. 4-06

Pending issuance of amended Power of Attorney regulations, the certification at the bottom of Power of Attorney forms, 2848 and 2428A, which is in lieu of witnessing or notarization of the principal's signature may be executed by an attorney or certified public accountant who qualified to represent the principal under Section 10.3 (a) or (b) of Circular 230 (revised) appropriate forms and tax returns will be revised accordingly at the earliest practicable date."

That section was effective as of 9-13-66, and dated 10-3-66.

Prior to that Regulation 601.504 (5) (ii) was effective. It states as follows:

“(ii) Exception. If the Power of Attorney is granted to an attorney or agent enrolled to practice before the Service and the agent certifies on the Power of Attorney that he is so enrolled, the acknowledgment under sub-division (1) of this paragraph shall not be required.”

The regulation provides no special form for certification that the attorney is so enrolled.

In this case, the attorney affixed his enrollment number to the power of attorney (Ex. H, Tr. 36) and forwarded it under a covering letter bearing his signature. This would appear sufficient when the power of attorney was forwarded on the letterhead of the attorney and the letter was signed by the attorney (Ex. C, Tr. 28 stipulated fact 2, Tr. 47) and his enrollment card is in evidence (Tr. 63, Ex. 3).

From the language of Regulation 601.504(5) (ii), it is apparent that what is intended is that when an enrolled practitioner is designated under the power of attorney that the acknowledgment is no longer needed, due to the fact that the qualification of the practitioner is established by his admission to practice.

It is undisputed that the District Director was advised both as to the name of the enrolled practitioner and his enrollment number.

The Court holds that the power of attorney which states:

“ . . . copies of correspondence addressed to taxpayer in proceedings involving the above matter(s) should be sent to:

Warde H. Erwin, 3323 SW. Harbor
Drive, Portland, Oregon” (Tr. 36)

is of absolutely no effect and that if the district director chooses to ignore the direction, it has no effect on his procedure and that notification to the attorney is a mere courtesy to be indulged in solely at the pleasure of the district director (Tr. 79).

The court further holds that such a direction does not “*in and of itself*” constitute a change of address (Tr. 79). However, the Court states that if the power of attorney form states that “originals” instead of copies be sent to the attorney that the power of attorney form does constitute a change of address and cites *D’Andrea v. Commissioner*, (C.A.D.C. 1959) 263 F.2d 904.

The Court recognizes, but passes quickly over Revenue Procedure 61-18:

It states (Tr. 79):

“The same revenue procedure provides that where the Power of Attorney merely directs that COPIES be sent to the attorney, that fact alone does not effect a change of last-known address of the taxpayer. *Each case must turn on its own facts.*”

That revenue procedure reads as follows:

“In general, it will be the Internal Revenue Service practice to *regard the address of the duly*

authorized representative as constituting the last known address of the taxpayer within the meaning of 6212 (b) of the Internal Revenue Code of 1954, in cases where, subsequent to the date on which he files a return on the taxable year, or concurrently with such filing, the taxpayer files a Power of Attorney with the Internal Revenue Service which authorizes the designated attorney to represent him and requests that 'all communications' concerning his tax matters with regard thereto, or concerning a proposed deficiency in tax for that taxable year be mailed to his attorney at his attorney's request. See *Mary Jo Williams, Adm. v. U. S.*, 264 F.2d 227 (1959), and *Marjorie F. Birnie v. Commissioner*, 16 T. C. 861 (1951).

"Under different facts and circumstances a determination as to what is taxpayer's last-known address will still be made on the basis of the particular facts involved, the requirements of 6212 (b) of the Code, and the applicable case law. For example, in cases in which the Power of Attorney directs that 'a copy of all communications' addressed to the taxpayer be sent the named attorney. The Tax Court of the United States has held that a notice sent directly to the taxpayer by registered mail at his last-known address will give the Tax Court jurisdiction upon the filing of a timely petition, *Draper Allen, et ux v. Commissioner*, 29 T. C. 113 (1957). Compare *Clement Brzezinski et al v. Commission*, 23 T. C. 192 (1954)."

The tax court states that the case law supports

the respondent (Tr. 80). However, it merely cites the two cases cited in the above revenue proceeding.

It fails to cite cases holding the notice to the attorney has also been held to give the tax court jurisdiction.

Stewart v. Commissioner, (C.A. 6, 1951) 186 F.2d 239.

Joseph Delman, T. C. Memo (C.A. 3) (App. 4-21-66) 20 AFTR2d 5543.

Birnie v. Commissioner, 16 T. C. 861 (1951).

Williams v. U. S., 164 F. Supp. 874, 264 F.2d 227.

It would appear that there are three or four cases in support of taxpayer's position against two for respondent of which both are of doubtful application since the *Allen* case holds that jurisdiction was acquired by a notice to taxpayers where a timely petition was filed, but that case does not hold that a notice to the representative followed by a timely petition would not likewise have conferred jurisdiction.

The two other tax court cases cited (*Parker*, 1949, and *Hurd*, 1947) were both early cases determined many years prior to the Revenue Ruling, and prior to the *Williams* and *Birnie* cases and much before the Ninth Circuit cases of *Tenzer v. Commissioner* and *Cohen v. United States*, (297 F.2d 760).

The tax court does cite *Cohen v. U. S.* but quotes from that opinion only the discussion relative to the constitutional question (Tr. 82).

The citation from the *Cohen* case which is ap-

plicable to this case and which should have been quoted, is as follows:

“We concluded, citing Boren and the dissent in *Dolezisk* that the 90 days ran from the time of personal service, basing our consideration on fairness and stating, ‘When the Commissioner chose personal service, he abandoned the other method (p. 958).’ We also said, ‘We also hold when the notice was correctly addressed, registered, and mailed that it was not wholly void, (for example, it was probably good enough to avoid the statute of limitations! (p. 958).’ Apparently, we had not made up our minds as to which date should govern when we decided *Rosewood Hotel, Inc. v. Commissioner*, 275 F.2d 786 (1966). We did so in *Tenzer*.”

The tax court stated that the petitioner relies on the *Tenzer* case (Tr. 81). That statement was true, then, and is true now.

The tax court attempts to distinguish the *Tenzer* case. It does so on the narrow ground stating:

“By contrast, the respondent in this case did not abandon his mailing method of service in favor of personal service. We seriously doubt whether the Court of Appeals would take the liberty of extending its *Tenzer* rationale to cover this situation since it specifically stated (285 F.2d at p. 958):

We see a consistent pattern in the cases that The Commissioner customarily uses registered (or now certified) mail. Well, he may, because with that, he has some idea when he stands under the statute.”

Petitioner has no trouble with the *Tenzer* rationale, but there would seem to be a great difficulty in understanding the attempted distinction or exactly how the commissioner's use of registered or certified mail supports the conclusion that the commissioner did or didn't abandon the mailing by delivery of another copy to the petitioner.

Surely, the Tax Court doesn't contend that the commissioner (District Director) intended in *Tenzer* to abandon his mailing by giving actual personal notice.

The court said in *Tenzer*:

"If the charge be made that we take liberties with the statute, it may be so. Anyone should try to make it work, and we have sought the true meaning of Congress believing it intended to make it work.

"The order of the Tax Court dismissing for lack of jurisdiction are reversed."

It is not words that we look to in case law, but principles.

In *Tenzer*, the court found an incomplete delivery by mail. The commissioner said it was good. The court disagreed. The principle of the *Tenzer* case was that where there had been a divorce (after the notice was sent) and the notice was not received by any mail that the intent of Congress was to start the period running from the time that the petitioners first had an opportunity to petition the tax court (which was when they received notice by actual delivery of a Deficiency Notice.

The identical principle seems even more applicable here. There was a divorce, a confusing polygot of various addresses, a power of attorney which was ignored, dealings with the attorney, and eventually delivery to the attorney of a copy of the notice of deficiency (Ex. I, Tr. 37) on or about November 17, 1966.

A petition was filed within ninety days of that date.

The *Tenzer* case principles have been adopted by the Arkansas District Court in the cases of *U. S. v. Lehigh*, 201 F. Supp. 224 where it was stated:

“The problem is discussed in *Boren v. Riddell*, (C.A. 9) 241 F.2d 670. See also *Tenzer v. Commissioner*, (C.A. 9) 265 F.2d 965 and *Mertens Op. Cit.* #49.133. The basis of the later holdings is that the older statute, Section 274(a) of the Internal Revenue Act of 1924 provided that the taxpayers shall be notified of a deficiency by registered mail whereas under Section 274(a) of the Internal Revenue Code of 1926 and under the 1939 and 1954 Codes, the Secretary or his delegate is simply ‘authorized’ to use registered (or certified) mail as a means of giving notice. It was not thought in *Boren* that the change in statutory language was not without significance and that the ‘heart of the taxpayer’s right is to have actual notice which enables him to petition his government if he so desires (241 F.2d 672).”

The plain and unvarnished truth is that the revenue service (supported to some substantial degree by the tax court) now and historically are doing all

possible to thwart fair and impartial dealings between that governmental agency and the citizen.

While there can be no question that the taxpayers' attorney's office inadvertently sent an incomplete power of attorney, it was nevertheless recognized as valid and was unquestioned by the service who required the revenue agent who prepared the revenue agent's report from which the notice of deficiency was copied to add the following (Tr. Vol. II, 42-3) :

"The power of attorney has been received so a statement to the effect that a copy of the report should be sent to the representative and should be added to the preliminary statement. The response (sic) statement not included on original report for reason taxpayer did not have representation during course of examination, power of attorney, submitted after report submitted."

The form used for that memorandum was form 3990 and 3990A.

No explanation has ever been given as to why the attorney was not notified pursuant to the directive set forth above.

The opinion of the tax court is merely a substantially verbatim copy of the respondent's brief. It does little to create the feeling that a fair and impartial hearing has been held on matters on which appellant had done considerable research.

About all, that can be said, is that the system of substantial copying of the government's brief results in a more expeditious determination of a dispute but

adds little to confidence by the public that the court has carefully examined the authorities cited nor considered carefully the arguments of the taxpayer.

The opinion of the court as to estoppel merely states (Tr. 82):

“We likewise reject the estoppel arguments advanced by petitioner for the reasons previously stated. There is no merit in invoking the doctrine of estoppel against the Commissioner under these circumstances.”

Whether estoppel will or will not need to be considered in determination of this case will be for this Court to decide, but the statement that there is no merit in the contention without citation of authorities or supporting facts appear to be questionable.

An analysis of the agent's testimony is revealing.

The agent's name was Carrier.

Carrier testified he didn't know of Erwin's power of attorney until after the requests for extension (form 872) were issued.

On page 53, (Tr. Vol. II, 53) he testified as follows:

“Q. And the only discussion you had with Mr. Erwin was in connection with those consent forms?

A. Right.”

By the foregoing, Carrier claims that he didn't know of Erwin's power of attorney until after the issuance of the consent forms because this was the

only conversation with the attorney and the sole subject of the discussion was to see if the consent forms were going to be sent (Tr. Vol. II, 50).

He testified (Tr. Vol. II, 53) :

“A. I believe that I may have called Mr. Erwin after those 872's were sent out.

Q. Those are these consent forms? And why did you call Mr. Erwin?

A. To see of they were going to be remitted.”

By Exhibit D, stipulated fact 3 (Tr. 30) it is known that the 872 forms were not issued until after April 4.

Since they were hand-delivered to Mrs. Houghton, and then given to Mr. Houghton, it would have had to be a day or two at the very earliest before Carrier would have called to find out why the extension consents had not been sent.

Since we know that there were three calls originating with Carrier and placed to the attorney Erwin, two of which were after April 4, it must have been no earlier than the earliest of those two. The earliest of those calls was on April 15, 1966, at twelve noon (Tr. Vol. II, 69).

Thus, by Carrier's own testimony and the telephone records, it is established that Carrier claimed that he didn't know of Erwin's representation of the taxpayers until April 15, 1966, at the earliest.

By Carrier's own testimony, it is further claimed that he talked with Erwin on only one subject

“whether or not the consent forms were going to be permitted.”

The records prove Mr. Carrier's testimony is unreliable.

He *“originated”* a call to the attorney on March 24, at 11:02 a.m.

Since that was prior to the date of issuance of the request for extension forms, the subject of that call could not have been the extension forms. It must have been in regard to the merits of the claim.

Since that call (March 24, 1966) was a week prior to the return of the agent's report from the review staff (March 31, 1966) stipulated (Tr. 58) Carrier's testimony that he didn't know of Erwin's representation until after the report was returned is false.

His claim that the only subject of conversation with Erwin was whether or not the consent to extension forms were going to be delivered is likewise false since he originated a call to the attorney before the request for extension forms were even issued.

From the foregoing, it must clearly appear that Carrier knew of the power of attorney and since it was addressed to him personally at his room number and mailed on March 18, and received on March 19 (stipulated fact #2), it must be assumed he had seen and acted upon it when he originated his call to the attorney on March 24, and that the subject of that call could not have been the extensions which weren't then even issued or requested.

What happened to the power of attorney between the time it was received by Carrier presumably and the time it was delivered to the review section is known only to the service but the existence of an attorney was well known both to review and to the agent.

Of significance is the use of the word "The" in the language of the direction to Carrier from the review staff relative to that power of attorney (Tr. Vol. II, 42).

If the existence of the power of attorney was neither known nor suspected by the service, the article "a" would have been used in the directive instead of "the."

The directive would have read:

"A power of attorney has been received"

Instead of

"*The* power of attorney has been received"

Can it be doubted that a power of attorney had been received and discussed within the service?

Further analysis of the directive is likewise interesting because the review section on March 31, 1966, was telling the agent (Carrier) what to put on his report to explain the lack of any statement on the report concerning the attorney:

" . . . statement (that the power of attorney had been received) not included on report for the reason taxpayer did not have representation during course of examination. Power of Attorney submitted after report submitted."

Why was it necessary to state that the power of attorney was received after the report was filed and to whom?

It seems logical that the report had not been completed and submitted to review when the power of attorney form was received but that the note from review was a "cover up" for Carrier's nondisclosure that a power of attorney had been in fact made a part of the record and received by him.

A conversation had already been had between the attorney and Carrier and the power of attorney was requested by the agent, Carrier, and forwarded at his directive to his room number and post office box (stipulated fact 2) (Tr. 47) which would not have in any other manner been known by the attorney on March 18, 1966.

It is likewise probable that he told the attorney prior to that time that he was then in the process of preparation of the report, since the letter transmitting the power of attorney on March 18, 1966, states:

"It would be appreciated if you will forward the schedules you have, *if any*."

It is almost a certainty that Carrier did not intend to deal with any attorney because even after he was aware of the power of attorney, he called the client directly (Tr. Vol. II, 53) and he was again directed to take up all matters with the attorney whereby he was compelled to call. (The subject matter of the call concerned the 872 extension forms (Tr.

Vol. II, 53) and therefore had to have taken place after April 4—Carrier's directive from review by their own records is on March 31).

It is entirely unexplained by the government why no copy of the report was sent to the attorney after their own directives required that to be done.

The final excuse regarding the incompleteness of the power of attorney form was not given until after an inquiry was made as to how they arrived at the assessment stage without notice (October 18—Exhibit G, stipulated fact #7) (Tr. 48) to anyone.

The evidence in this case indicates an apparent and unexplained deliberate attempt to keep the attorney from examining the report or any notice.

If it be explained on the ground that the 30-day letter was omitted, because of the imminence of the expiration of the period of limitations on assessment, that is little excuse where the imminent expiration of the statute of limitations was caused by their own acts.

The entire conduct if intentional, is less than commendable.

In *Stearns v. U. S.*, 291 U.S. 54 at page 61, it is said:

“The applicable principle is fundamental and unquestioned. He who prevents a thing from being done may not avail himself of the non-performance which he has himself occasioned for the law says to him in effect: ‘this is your own act and

therefore you are not damnified.' Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for either."

Other cases supporting the same principle are:

Robbins v. U. S., 21 F. Supp. 403.

Exchange & Savings Bank of Berlin v. U. S.,
226 F. Supp. 56.

Johnson v. Commission, 2 O.T.C. Adv. Sh. 521.

Simmons v. U. S. (C.A. 5, 1962) 308 F.2d 938.

Schuster v. C. I. R. (C.A. 9, 1962) 312 F.2d
311.

SPECIFICATION OF ERROR II

The Court erred in finding that the provisions of P. L. 89-332 (5 U.S.C. 1012 and 1013, 5 U.S.C.A. 500) does not apply because petitioner did not file with the Internal Revenue Service a declaration that he is a member in good standing of the Bar of the highest court of any state and in further finding that even if a sufficient declaration was filed, that the provisions of the law did not affect the validity of notice sent to petitioner without notice to the attorney and that the statute did not make it mandatory to send a copy of the notice to the attorney.

Points and Authorities

Public Law 89-332 (5 U.S.C. 1012 and 1013, 5 U.S.C.A. 500) requires that any notice required to be given to a participant before any government agency shall also be given to the attorney or certified public accountant representing him.

P.L. 89-332 (set forth in appendix in full).

No form of written declaration is specified in the law to show that the petitioner is represented, and the attorney is duly licensed to practice.

P. L. 89-332 (Tr. 86-7).

The purpose of P. L. 89-332 was to require the agencies to deal with the counsel selected by a participant.

SENATE REPORT No. 755, 89th Congress, 1st Session. (Set forth in appendix in full).
(Tr. 85)

HOUSE REPORT No. 1141, 1st Session, p. 4170.

A law which is mandatory in its clear terms and which has for its purpose *that governmental agencies shall deal with counsel selected by a participant who is appearing before such governmental agency* which provides that notice shall be given to such representative "*in addition to any other notice specifically required by statute*" amends all other statutes requiring notice to a participant by adding to such statutes a requirement that notice shall be given to the participant's legal representative and failure to do so renders the notice incomplete and void.

Public Law 89-332 (5 U.S.C. 1012-1013, 5 U.S.C.A. 500).

Argument

The Court held that Public Law 89-332 was not applicable for two reasons:

1. There was an insufficient (or no) representa-

tion that the attorney was “currently qualified” (Tr. 86)

2. Assuming there was a proper declaration, Public Law 89-332 did not affect the validity of a Notice of a Proposed Deficiency required by Section 6212 of the Internal Revenue Code.

a. Because the law merely requires an “additional service” (Tr. 88 (n)), and

b. The intent of the statute was merely to do away with agency-established requirements for representatives (as applied to attorneys and certified public accountants (Tr. 85)).

Petitioner submits that the Court’s finding was erroneous in all respects.

As to whether or not there was a sufficient written declaration that the attorney was qualified, the petitioner states as follows:

1. That a declaration is required to the effect merely that the attorney is “currently qualified.”

2. That the statute does not specify any particular form for such declaration.

3. That the notification to the agency was accomplished by the attorney’s signature and an enclosure by which he was appointed by the taxpayer as his representative to do all things which the taxpayer could do (except endorse and collect checks). On the appointment form was also included the number of the attorney’s enrollment

card (63-11776) (previously required prior to passage of P. L. 89-332 (Ex. H, Tr. 36) which enrollment card indicated that the representative was "*currently*" enrolled to practice "*as an attorney*" before the U. S. Treasury Department.

It is admitted that no form is required by the statute to notify the Internal Revenue Service (Last sentence, Tr. 86) of the attorney's qualification or representation.

Does the word "declaration" as used in the statute mean a "formal statement?" That is the interpretation required by the Tax Court. The taxpayer contends that what is meant is a statement or statements sufficient to advise the agency (1) that the representative is "currently qualified as an attorney and represents the client."

The dictionary definition of "declare" being "to make known, reveal or explain" should be sufficient to accomplish the intent of the statute.

The Court can, if necessary, take judicial notice that the State of Oregon has an integrated bar and that it is unlawful for a person, not currently licensed, to practice law or hold himself out as a lawyer, but it would not appear necessary where there was a sufficient declaration in any event. (See ORS 9.160 and ORS 9.220. Also ORS 41.360 (33) to the effect that there is a presumption that the law has been obeyed).

It can scarcely be doubted in this case that the

Service knew of the qualification of the representative and having themselves recognized that fact by its own internal memorandum (Tr. Vol. II, 42) and in any event by dealing with the representative. Any formal omissions as to current qualifications would be surely waived by their actions in dealing with the representative.

The executed power of attorney form fully advised that the attorney represented the taxpayers when forwarded under cover of the attorney's letterhead and over his signature.

The Tax Court did not cite any authority for its statement that Public Law 89-332 merely required an "additional service" and did not affect the provisions of Section 6212 requiring notice of deficiency to be sent to the taxpayer.

The reasoning escapes the writer of this brief. The statute says notice to a representative "*shall be sent to the representative in addition to any other notice.*"

What would those words mean if they mean (as the Tax Court holds) that any agency may ignore that statute and it will not affect the other required notices?

The conclusions seem too clear to require argument. The error here also probably came from merely copying the respondent's brief.

The last reason given for finding that Public Law 89-332 had no application was that the "*intent of*

Congress” was merely to take away the licensing requirements set up by several governmental agencies.

It is surely agreed that the “intent of Congress” is the law.

Williams v. USFG, 236 U.S. 541.

It is further agreed that part of the purpose in adopting P. L. 89-332 was to remove agency-licensing restrictions insofar as attorneys and certified public accountants are concerned.

However, that was only one part of the legislative purpose.

The committee report quoted on page 85 of the transcript in a note to the Opinion, states in the last sentence:

“It would also require the agencies to deal with the counsel so selected.”

The last statement is completely ignored in the Tax Court Opinion.

The Congressional intent (as it applies to this case) is clear and has been completely ignored.

CONCLUSION

The intent of Congress as previously set forth by this Court in the case of *Tenzer v. Commissioner*, would appear to be all that was necessary to determine this case.

The ultimate determination to dismiss for lack of

jurisdiction may, however, have to be affirmed.

As the writer now understands it, if there has been no notice given, due to failure to comply with Public Law 89-332, then the Tax Court would not have jurisdiction for failure to send a notice pursuant to Section 6212, since the mailing of notice is a jurisdictional requirement to Tax Court jurisdiction under 26 U.S.C. 6213 which states insofar as applicable:

“. . . no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day . . . period.”

Nathaniel A. Denman, 35 T. C. 1140.

Thus, a holding that the Revenue Service failed to comply with Public Law 89-332 (5 U.S.C. 1012 and 1013, 5 U.S.C.A. 500) would permit these parties to start all over again so that the case may again be put in its proper posture.

A holding that Public 89-332 is not applicable would require a determination of when (if at all) proper notice has yet been mailed to petitioner at his *last known address*.

If it had not been properly mailed, then the Court would not have jurisdiction unless the Court found that actual notice through delivery to the attorney's office in November, 1966, was sufficient notice in which case the Tax Court does have jurisdiction, and the Tax Court could proceed to determine the matter on the petition.

Petitioner feels that the holding should be based upon Public Law 89-332 requiring new notices followed by new petition.

Argument for Specification of Error III omitted.

Argument included under Specification V.

Respectfully submitted,

WARDE H. ERWIN
Attorney for Appellant



APPENDIX

Public Law 89-332

AN ACT

To provide for the right of persons to be represented in matters before Federal agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That—

(a) Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia may represent others before any agency upon filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular party in whose behalf he acts.

(b) Any person who is duly qualified to practice as a certified public accountant in any State, possession, territory, Commonwealth, or the District of Columbia may represent others before the Internal Revenue Service of the Treasury Department upon filing with that agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular party in whose behalf he acts.

(c) Nothing herein shall be construed (i) to grant or deny to any person who is not qualified as provided by subsection (a) or (b) the right to appear for or represent others before any agency or in any agency proceeding; (ii) to authorize or limit the discipline, including disbarment, of persons who appear in

a representative capacity before any agency; (iii) to authorize any person who is a former officer or employee of an agency to represent others before an agency where such representation is prohibited by statute or regulation; or (iv) to prevent an agency from requiring a power of attorney as a condition to the settlement of any controversy involving the payment of money.

(d) This section shall not be applicable to practice before the Patent Office with respect to patent matters which shall continue to be covered by chapter 3 (sections 31 to 33) of title 35 of the United States Code.

Sec. 2. When any participant in any matter before an agency is represented by a person qualified pursuant to subsection (a) or (b) of section 1, any notice or other written communication required or permitted to be given to such participant in such matter shall be given to such representative in addition to any other service specifically required by statute. If a participant is represented by more than one such qualified representative, service upon any one of such representatives shall be sufficient.

Sec. 3. As used in this Act, "agency" shall have the same meaning as it does in section 2(a) of the Administrative Procedure Act, as amended (60 Stat. 237, as amended).

Approved November 8, 1965.

The purpose of Public Law 89-332 is stated in Senate Report No. 755, 89th Cong., 1st Sess., as follows:

This legislation is designed to do away with agency-established bars for attorneys who ap-

pear before certain Federal administrative agencies. In those agencies which require that lawyers become members of such bars to represent clients before the agency, lawyers have met with delays attempting to deal with even the most routine tasks. The responses of attorneys prompted by this bill's introduction cite examples of difficulty in attempting to bring even simple matters before these agencies.

The bill would do away with agency-established admission requirements for licensed attorneys, and thus allow persons to be represented before all Federal agencies by counsel of their choice. It would also require the agencies to deal with the counsel so selected.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK D. HOUGHTON,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE ORDER OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

RICHARD C. PUGH,
Acting Assistant Attorney General.

LEE A. JACKSON,
ROBERT N. ANDERSON,
MARIAN HALLEY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

FILED

FEB 21 1968

WM. B. LUCK, CLERK

INDEX

	<u>Page</u>
Opinion below-----	1
Jurisdiction-----	1
Question presented-----	2
Statutes and other authorities involved-----	2
Statement-----	2
Summary of argument-----	6
Argument:	
<p>The Tax Court correctly decided that the notice of deficiency was properly sent to the taxpayer's last known address and that, therefore, the Tax Court lacked jurisdiction of the case because the taxpayer filed his petition for redetermination of the deficiency more than 90 days after such mailing---</p>	
A. Introduction-----	7
B. The notice of deficiency was properly sent to the taxpayer's last known address-----	8
C. Taxpayer's last known address was not changed by the filing of a power of attorney which requested that "copies" of correspondence be sent to his attorney----	11
D. The Act of November 8, 1965 did not require that a duplicate of taxpayer's notice of deficiency be sent to his attorney-----	13
Conclusion-----	16
Appendix-----	18

CITATIONS

Cases:

<u>Allen v. Commissioner</u> , 29 T.C. 113-----	11, 12
<u>Brown v. Lethert</u> , 370 F. 2d 560-----	8
<u>Clark's Estate v. Commissioner</u> , 173 F. 2d 13-----	12
<u>Cohen v. United States</u> , 297 F. 2d 760, certiorari denied, 369 U.S. 865-----	9
<u>Delman v. Commissioner</u> , decided October 10, 1967 (20 A.F.T.R. 2d 5543)-----	12

Cases (continued):

<u>Houghton v. Commissioner</u> , 48 T.C. 656-----	1
<u>Klamath Medical Service Bureau v. Commissioner</u> , 261 F. 2d 842-----	9
<u>Luhring v. Glotzbach</u> , 304 F. 2d 556-----	9
<u>Maxfield v. Commissioner</u> , 153 F. 2d 325-----	9
<u>National Brass Works v. Commissioner</u> , 205 F. 2d 104----	9
<u>Parker v. Commissioner</u> , 12 T.C. 1079-----	11
<u>Tenzer v. Commissioner</u> , 285 F. 2d 956-----	8
<u>Vibro Manufacturing Co. v. Commissioner</u> , 312 F. 2d 253-8	
<u>Williams v. United States</u> , 264 F. 2d 227-----	12

Statutes:

Act of November 8, 1965, P.L. 89-332, 79 Stat. 1281:	
Sec. 1 (5 U.S.C. Appendix, 1964 ed., Supp. II, Sec. 1012)-----	19
Sec. 2 (5 U.S.C. Appendix, 1964 ed., Supp. II, Sec. 1013)-----	19
Internal Revenue Code of 1954:	
Sec. 6212 (26 U.S.C. 1964 ed., Sec. 6212)-----	18
Sec. 6213 (26 U.S.C. 1964 ed., Sec. 6213)-----	18

Miscellaneous:

9 Mertens, Law of Federal Income Taxation (Rev.), Sec. 51.22-----	9
Rev. Proc. 61-18, 1961-2 Cum. Bull. 550-----	12
S. Rep. No. 755, 89th Cong., 1st Sess., p. 3-----	20

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22,215

JACK D. HOUGHTON,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE ORDER OF THE

TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (I-R. 68-89) are reported at 48 T.C. 656.

JURISDICTION

This petition for review (I-R. 91-92) involves federal income taxes for the taxable years 1958, 1959 and 1960. On June 8, 1966, the Commissioner of Internal Revenue mailed to taxpayer a notice of deficiency asserting deficiencies in income tax and penalties in the aggregate amount of \$3,607.29. (I-R. 5-13.) On December 22, more than 90 days after mailing of the notice of deficiency, taxpayer filed a petition with the Tax Court for a redetermination

of the asserted deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-14.) On February 10, 1967, the Commissioner moved to dismiss for lack of jurisdiction for failure of the taxpayer to file a petition within the statutory period. (I-R. 16-17.) On March 6, 1967, the taxpayer filed an objection to the Commissioner's motion to dismiss. (I-R. 20-25.) The order of the Tax Court, granting the motion to dismiss, was entered August 8, 1967. (I-R. 90.) The case is brought to this Court by a petition for review filed August 16, 1967 (I-R. 91-92), within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTION PRESENTED

Whether the Tax Court correctly decided that the notice of deficiency was properly sent by the Commissioner to the taxpayer's last known address and that, therefore, the Tax Court lacked jurisdiction of the case because the taxpayer filed his petition for redetermination of the deficiency more than 90 days after such mailing.

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent parts of the statutes and other authorities involved will be found in the Appendix, infra.

STATEMENT

The material facts, as found by the Tax Court, are as follows:

A statutory notice of deficiency was sent by certified mail on June 8, 1966, to the taxpayer at 6325 S. W. Alfred Street,

Portland, Oregon 97219. The notice determined deficiencies and additions to tax for the years 1958, 1959 and 1960. A copy of the notice of deficiency was not mailed at that time to his attorney, Warde H. Erwin. (I-R. 71.)

On June 9, 1966, Lloyd Brown, a letter carrier, attempted to deliver the certified mail to taxpayer at 6325 S. W. Alfred Street, Portland, Oregon 97219. Finding no one at home, he filled out a notice of certified mail, a form that stated that certified mail was being held for the taxpayer at the post office. Brown left this notice in taxpayer's mailbox at 6325 S. W. Alfred Street, which is the customary post office procedure in handling certified mail. Taxpayer did not pick up the statutory notice of deficiency at the post office. On June 27, 1966, it was returned to the Commissioner marked "Unclaimed." (I-R. 71.)

Taxpayer resided at 6325 S. W. Alfred Street, Portland, Oregon, from 1957 to 1961 when he was divorced from his wife. He temporarily left that address for two or three short periods of time in 1961. Since 1962 he has continuously resided at 6325 S. W. Alfred Street, Portland, Oregon, and that is his present address. Taxpayer receives all his mail from his attorney, Warde H. Erwin, at 6325 S. W. Alfred Street, and he received several letters from him at that address in 1966. Taxpayer used 6325 S. W. Alfred Street as his address on his federal income tax returns. He has executed consents fixing periods of limitation upon assessment of income tax on several occasions. All but one of these consents, which was signed in 1962,

used 6325 S. W. Alfred Street as his address. The consent executed in 1962 used a temporary business address of taxpayer which was never used again. The powers of attorney executed by taxpayer in March and October of 1966 used 6325 S. W. Alfred Street as his address. Taxpayer's sworn petition to the Tax Court alleges that his residence address is 6325 S. W. Alfred Street. (I-R. 74.)

Taxpayer has never requested or directed any agent of the Commissioner to change his address from 6325 S. W. Alfred Street, Portland, Oregon, to any other address.

The Tax Court found as ultimate fact that taxpayer's last known address is and was at the time the notice of deficiency was mailed to him on June 8, 1966, 6325 S. W. Alfred Street, Portland, Oregon 97219. (I-R. 74.)

On and after March 19, 1966, the Commissioner had on file in his Portland office a general power of attorney (Treasury Department Form 2848) signed by taxpayer appointing Warde H. Erwin as his attorney-in-fact. The power of attorney was signed by taxpayer on March 17, 1966. His signature was not notarized or witnessed and there was no certification by an enrolled attorney or agent in lieu of witnessing or notarization. The power of attorney did not contain a request that all correspondence addressed to taxpayer be sent to his attorney, but only that copies thereof be sent to his attorney. The power of attorney was sent to the Commissioner's Portland office by a letter dated March 18, 1966, addressed to Revenue Agent, A. Carrier. (I-R. 71-72.) By mistake another copy of the general power of attorney, properly signed and notarized, was

kept in Erwin's office files and was never sent to or received by the Commissioner.

On April 4, 1966, requests for extensions of the statutory period of limitation on assessment were mailed to taxpayer by the Commissioner's chief of the Audit Division. These were signed by taxpayer and given to Warde H. Erwin. They were not delivered to the Commissioner. Several times in March and April 1966 Erwin contacted Revenue Agent Carrier or the agent contacted Erwin. (I-R. 72.)

On July 21, 1966, Erwin wrote a letter to taxpayer stating that he had heard nothing further from the Commissioner and that he believed that the matter had been successfully terminated. A statement for services rendered was enclosed with the letter. (I-R. 72.)

The deficiencies and additions to tax were assessed by the Commissioner on October 14, 1966, and notice thereof was received by taxpayer on October 18, 1966. (I-R. 72.)

By letter dated October 18, 1966, an attorney, Curtis H. Levin, advised the Commissioner's Portland office that taxpayer had not received the notice of deficiency dated June 8, 1966. In the same letter he sent an additional power of attorney dated October 18, 1966, properly signed and notarized, which appointed Warde H. Erwin and Curtis H. Levin as attorneys-in-fact for taxpayer. On or about November 17, 1966, Levin received a copy of the notice of deficiency dated June 8, 1966. (I-R. 73.)

The petition for redetermination of the asserted deficiencies in this case was mailed on December 20, 1966, and was filed with the Tax

Court on December 22, 1966, 197 days after the deficiency notice was mailed. (I-R. 75.)

In an order dated August 8, 1967, the Tax Court, granting the Commissioner's motion to dismiss based on the failure of the taxpayer to file a petition within the statutory period, ordered that the case be dismissed for lack of jurisdiction. (I-R. 90.) This review followed. (I-R. 91-92.)

SUMMARY OF ARGUMENT

In order for the Tax Court to acquire jurisdiction of a case, two requirements must be met: (1) a notice of deficiency must be properly mailed to the taxpayer and (2) the taxpayer must file a petition with the Tax Court for a redetermination of the deficiency within 90 days of the mailing of such notice. The notice of deficiency in the present case was, following the provisions of the pertinent statute, properly mailed to taxpayer's last known address, and therefore started the running of the 90-day filing period. Since taxpayer did not file within this period, the Tax Court correctly dismissed the petition for lack of jurisdiction.

The notice of deficiency was sent to 6325 S. W. Alfred Street, where taxpayer has resided continuously since 1962 and where he presently resides. The Tax Court correctly found from substantial and undisputed evidence that 6325 S. W. Alfred Street was taxpayer's last known address within the meaning of Section 6212. When taxpayer filed an incomplete and invalid power of attorney in which he requested that the Internal Revenue Service send copies of

correspondence with him to his attorney, he did not change his last known address for purposes of mailing a notice of deficiency to him. Moreover, the provisions of the Act of November 8, 1965, P.L. 89-332, 79 Stat. 1281 could not under any circumstance be applicable herein, since taxpayer's attorney did not comply with the preliminary filing requirements of that statute.

ARGUMENT

THE TAX COURT CORRECTLY DECIDED THAT THE NOTICE OF DEFICIENCY WAS PROPERLY SENT TO THE TAXPAYER'S LAST KNOWN ADDRESS AND THAT, THEREFORE, THE TAX COURT LACKED JURISDICTION OF THE CASE BECAUSE THE TAXPAYER FILED HIS PETITION FOR REDETERMINATION OF THE DEFICIENCY MORE THAN 90 DAYS AFTER SUCH MAILING

A. Introduction

Section 6212(a) of the Internal Revenue Code of 1954, Appendix, infra, provides that when the Commissioner of Internal Revenue determines that there is a deficiency in income tax, he is authorized to send notice of such deficiency to the taxpayer by certified or registered mail. Section 6212(b)(1) of the Code, Appendix, infra, provides that such notice will be sufficient if mailed to the taxpayer at his "last known address". If a taxpayer wants to contest such deficiency prior to assessment, he must file a petition for a redetermination of the deficiency with the Tax Court within 90 days from the date of the mailing of the notice of deficiency. Section 6213(a) of the 1954 Code, Appendix, infra.

In order that the Tax Court acquire jurisdiction of a case, two requirements must be met: (1) notice of deficiency must be properly mailed to the taxpayer, and (2) the taxpayer must petition the Tax Court within 90 days of the mailing of such notice. See Vibro Manufacturing Co. v. Commissioner, 312 F. 2d 253 (C.A. 2d, 1963). In the present case, since, as we will show below and as the Tax Court held, the Commissioner clearly complied with the first jurisdictional requirement, and since the taxpayer admittedly did not comply with the second jurisdictional requirement, the Tax Court did not have jurisdiction to hear the case and correctly granted the Commissioner's motion to dismiss for lack of jurisdiction.

B. The notice of deficiency was properly sent to the taxpayer's last known address

The notice of deficiency mailed by the Commissioner was sufficient to commence the running of the 90-day period in which taxpayer could petition the Tax Court for a redetermination if it was properly mailed to taxpayer's "last known address".

Section 6212, Internal Revenue Code of 1954. Actual receipt of the notice by the taxpayer is not required. 1/ Brown v. Lethert, 360

1/ Tenzer v. Commissioner, 285 F. 2d 956 (C.A. 9th, 1960) which taxpayer cites (Br. pp. 26-27), is completely distinguishable from the present case. In that case this Court held only that personal service of a notice of deficiency replaced prior service by mail, so that the taxpayer's petition for review was timely when filed within 90 days of the personal service. Certainly, there was no such abandonment of service by mail in this case.

F. 2d 560 (C.A. 8th, 1966); Cohen v. United States, 297 F. 2d 760 (C.A. 9th, 1962), certiorari denied, 369 U.S. 865 (1962); Luhring v. Glotzbach, 304 F. 2d 556 (C.A. 4th, 1962). In Cohen v. United States, supra, this Court explained that "We think it clear that the Congress, when it 'authorized' service by registered mail, did not intend to require actual receipt by the addressee of the letter. Rather, it permitted the use of a method of giving notice that would ordinarily result in such receipt". 297 F. 2d, p. 772.

The notice of deficiency was sent to 6325 S. W. Alfred Street which the Tax Court after reviewing all the evidence of record found was the taxpayer's last known address at the date of mailing. (I-R. 71, 74.) The courts have uniformly held in cases involving Section 6212 of the 1954 Code and its precursors that "the last known address * * * becomes a matter of proof in each case in which the question arises." Maxfield v. Commissioner, 153 F. 2d 325, 326 (C.A. 9th, 1946).

If a finding of fact by the Tax Court is based on substantial evidence, the appellate court will affirm on review unless it appears that the great weight of evidence is against it. Klamath Medical Service Bureau v. Commissioner, 261 F. 2d 842 (C.A. 9th, 1958). This Court has stated that "unless clear error appears, we cannot disturb a Tax Court's finding or conclusion". National Brass Works v. Commissioner, 205 F. 2d 104, 107 (C.A. 9th, 1953). See also 9 Mertens, Law of Federal Income Taxation (Rev.), Section 51.22.

The Tax Court's finding that taxpayer's last known address was 6325 S. W. Alfred Street was based on substantial and uncontradicted evidence. Taxpayer testified that he has lived at that address since 1957, and has been there continuously since 1962. (Tr. 97, 98.)^{2/} When asked his present address, he replied that it was 6325 S. W. Alfred Street. (Tr. 74.) He also testified that that is the address to which his attorney always sends his mail. (Tr. 97.) This weighty testimony was not contradicted by any evidence of his having another address.

Moreover, as the Tax Court noted (R. 77), taxpayer used 6325 S. W. Alfred Street on his Federal income tax returns; he executed consents to extend the statutory period for assessment for the years in issue on which he used that address, except for one on which he utilized a temporary business address, in 1962; he executed powers of attorney in March and October, 1966, using that address; he has received mail sent to him by the Commissioner at that address; and in his sworn petition to the Tax Court he alleged 6325 S. W. Alfred Street, Portland, Oregon, to be his residence address. In the face of this overwhelming evidence the Tax Court had no alternative but to find as an ultimate fact, as it did (R. 74), that the taxpayer's last known address is and was at

^{2/} "Tr." references are to the Official Report of Proceedings Before the Tax Court (Doc. No. 11), which is included in Vol. II of the record on review.

the time the notice of deficiency was mailed to him on June 8, 1966, 6325 S. W. Alfred Street, Portland, Oregon, 97219. Accordingly, there can be no question that the notice of deficiency was properly mailed to the taxpayer within the meaning of the pertinent statute.

C. Taxpayer's last known address was not changed by the filing of a power of attorney which requested that "copies" of correspondence be sent to his attorney

The power of attorney sent by the taxpayer to the Commissioner's Portland office in March, 1966, was not properly notarized or witnessed and therefore was not valid. However, even if it had been valid, it would not possibly have effected a change in taxpayer's last known address, since it requested only that copies of correspondence, rather than original documents, be sent to taxpayer's attorney. (I-R. 71-72.) Allen v. Commissioner, 29 T.C. 113 (1957); Parker v. Commissioner, 12 T.C. 1079 (1949).

In Allen v. Commissioner, supra, the court concluded that a request to send copies of correspondence to taxpayer's attorney did not effect a change in taxpayer's last known address. In that case, although the taxpayer had requested that copies be sent to his attorney, a notice of deficiency and an attached statement were sent to the taxpayer, and the attorney received only a copy of the attached statement. The court held that such notice was sufficient to start the 90-day period running, pointing out that the express statutory provision, calling for mailing to the taxpayer, had indeed been complied with.

While it may be true that a request in a valid power of attorney that all correspondence be sent to the taxpayer's attorney may change his last known address for purposes of Section 6212(b)(1), nevertheless, the revenue ruling (Rev. Proc. 61-18, 1961-2 Cum. Bull. 550) that announced the acceptance of this rule of case law also stated that under different circumstances the determination of the last known address would be made according to the particular facts and the applicable case law. It then went on to approve the holding in Allen v. Commissioner, supra, as the rule to be followed when a power of attorney directs that only copies be sent to the attorney.

Recent approval has been given to the proposition that "a notice complies with the statute if sent to the address where the Commissioner reasonably believes the taxpayer wished to be reached". Delman v. Commissioner (C.A. 2d), decided October 10, 1967 (20 A.F.T. R. 2d 5543), citing Clark's Estate v. Commissioner, 173 F. 2d 13 (C.A. 2d, 1949). Similarly, in Williams v. United States, 264 F. 2d 227, 229 (C.A. 6th, 1959), the court found the necessary "minimum compliance" with the statute when the Commissioner mailed a notice of deficiency to a lawyer in accord with the taxpayer's request in a power of attorney, even though the power of attorney had been revoked by the taxpayer's death. In rejecting the contention of the decedent's personal representative that the assessment was void because the statutory notice of deficiency on which it was predicated was not mailed to the taxpayer "at his last known address" within

the meaning of Section 6212(b)(1) of the 1954 Code, the Sixth Circuit said (264 F. 2d 227, 228):

It is true of course, as appellants say, that death of the taxpayer revoked the authority of the attorney.
* * * But revocation of the power of attorney did not erase the taxpayer's request therein to the Director that "all communications and other matters be mailed" to the taxpayer at the attorney's address.
(Emphasis supplied.)

In the instant case it is clear, as we have pointed out above, that in his non-notarized and non-witnessed power of attorney the taxpayer merely requested that copies of correspondence rather than original documents be sent to his attorney. Certainly, in this situation the Commissioner, even if he were prepared to honor the power of attorney with its shortcomings, could not have reasonably believed that the taxpayer wanted him to send the original of the notice to any place other than 6325 S. W. Alfred Street. Accordingly, in the present case, where the Commissioner had received many income tax returns and consents fixing periods of limitation showing that address as taxpayer's address (I-R. 74) he acted reasonably, and in full compliance with Section 6212(b)(1) when he sent the notice of deficiency to that location.

D. The Act of November 8, 1965 did not require that a duplicate of taxpayer's notice of deficiency be sent to his attorney

Taxpayer contends (Br. 36) that under the provisions of the Act of November 8, 1965, P.L. 89-332, 79 Stat. 1281, Secs. 1, 2

(5 U.S.C. Appendix, 1964 ed., Supp. II, Secs. 1012, 1013), Appendix, 3/ infra, service of a notice of deficiency on both the taxpayer and his attorney is necessary to satisfy the mailing requirements of Section 6212. That statute, in pertinent part reads as follows:

(a) Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia may represent others before any agency upon filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular party in whose behalf he acts.

* * *

(c) Nothing herein shall be construed (i) to grant or deny to any person who is not qualified as provided by subsection (a) or (b) the right to appear for or represent others before any agency or in any agency proceedings; (ii) to authorize or limit the discipline, including disbarment, of persons who appear in a representative capacity before any agency; (iii) to authorize any person who is a former officer or employee of an agency to represent others before an agency where such representation is prohibited by statute or regulation; or (iv) to present an agency from requiring a power of attorney as a condition to the settlement of any controversy involving the payment of money.

* * *

Sec. 2. When any participant in any matter before an agency is represented by a person qualified pursuant to subsection (a) or (b) of section 1, any notice or other written communication required or permitted to be given to such participant in such matter shall be given to such representative in addition to any other service specifically required by statute. If a participant is represented by more than one such qualified representative, service upon any one of such representatives shall be sufficient. (Emphasis supplied.)

3/ Now 5 U.S.C., Section 500, as restated by Sec. 1(a) of the Act of September 11, 1967, P.L. 80-83, 81 Stat. 195.

It is not necessary, however, to here consider whether this Act requires such duplicate service in order to satisfy the mailing requirements of Section 6212. This is because taxpayer's attorney is not "a person qualified pursuant to subsection (a) or (b) of Section 1," and therefore the provisions of Section 2 have no application whatsoever in the instant case.

Section 1(a) of the Act of November 8, 1965, supra, requires that in order to qualify as the representative of a person who brings a case before a federal agency, an attorney must file with the agency "a written declaration that he is currently qualified" as a member in good standing of the highest court of his state and that he "is authorized to represent the particular party in whose behalf he acts." Actually it is clear that the permission to represent others before any agency is conditioned upon first filing such a declaration. Taxpayer's attorney did not file any "declaration" of any sort with the Internal Revenue Service. The incomplete, non-notarized, non-witnessed power of attorney form filed with the Commissioner's Portland office could not possibly be construed as a declaration by his attorney that the attorney was a member of the bar of the highest court of his state or that he was authorized to represent the taxpayer. Although the statute does not require that the declaration be in any particular form, it does require a formal written statement containing certain information. Since no such statement was filed, the provision for

additional service found in Section 2 does not come into play, and the lack of such additional mailing is of no significance.

But it is submitted that even if Section 2 of the Act of November 8, 1965 does apply, failure to send a duplicate deficiency notice to Erwin would not invalidate the mailing of the deficiency under Section 6212 of the Internal Revenue Code. The clear purpose of this Act was to eliminate certain agency requirements for practice before those agencies. See S. Rep. No. 755, 89th Cong., 1st Sess., p. 3, Appendix, infra. Congress did not intend to amend Section 6212 of the Internal Revenue Code, but merely to provide additional service on representatives who qualified themselves pursuant to Sections 1(a) or (b) of the Act. It is submitted that the Tax Court correctly concluded (I-R. 88, fn. 6) that the additional service was not mandatory, and that failure to make the additional service would not be a jurisdictional defect.

CONCLUSION

For the reasons stated above, the order of the Tax Court dismissing taxpayer's petition for redetermination for lack of jurisdiction should be affirmed.

Respectfully submitted,

RICHARD C. PUGH,
Acting Assistant Attorney General.

LEE A. JACKSON,
ROBERT N. ANDERSON,
MARIAN HALLEY,
Attorneys,
Department of Justice,
Washington, D.C. 20530

FEBRUARY, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39, of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of February, 1968.

Attorney

APPENDIX

Internal Revenue Code of 1954:

SEC. 6212 [as amended by Secs. 89(b) and 76 of the Technical Amendments Act of 1958, P.L. 95-866, 72 Stat. 1606].
NOTICE OF DEFICIENCY.

(a) In General.--If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) Address for Notice of Deficiency.--

(1) Income and Gift Taxes.--In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A or chapter 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

* * * *

(26 U.S.C. 1964 ed., Sec. 6212.)

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES;
PETITION TO TAX COURT.

(a) Time for Filing Petition and Restriction on Assessment.--Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. ***

* * * *

(26 U.S.C. 1964 ed., Sec. 6213.)

Act of November 8, 1965, P.L. 89-332, 79 Stat. 1281:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembly, That--

(a) Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia may represent others before any agency upon filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular party in whose behalf he acts.

(b) Any person who is duly qualified to practice as a certified public accountant in any State, possession, territory, Commonwealth, or the District of Columbia may represent others before the Internal Revenue Service of the Treasury Department upon filing with that agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular party in whose behalf he acts.

(c) Nothing herein shall be construed (i) to grant or deny to any person who is not qualified as provided by subsection (a) or (b) the right to appear for or represent others before any agency or in any agency proceeding; (ii) to authorize or limit the discipline, including disbarment, of persons who appear in a representative capacity before any agency; (iii) to authorize any person who is a former officer or employee of an agency to represent others before an agency where such representation is prohibited by statute or regulation; or (iv) to prevent an agency from requiring a power of attorney as a condition to the settlement of any controversy involving the payment of money.

*

*

*

(5 U.S.C. Appendix, 1964 ed., Supp. II, Sec. 1012.)

Sec. 2. When any participant in any matter before an agency is represented by a person qualified pursuant to subsection (a) or (b) of section 1, any notice or other written communication required or permitted to be given to such participant in such matter shall be given to such representative in addition to any other service specifically required by statute. If a participant is represented by more than one such qualified representative, service upon any one of such representatives shall be sufficient.

(5 U.S.C. Appendix, 1964 ed., Supp. II, Sec. 1013.)

S. Rep. No. 755, 89th Cong., 1st Sess. , p. 3:

This legislation is designed to do away with agency-established bars for attorneys who appear before certain Federal administrative agencies. In those agencies which require that lawyers become members of such bars to represent clients before the agency, lawyers have met with delays attempting to deal with even the most routine tasks. The responses of attorneys prompted by this bill's introduction cite examples of difficulty in attempting to bring even simple matters before these agencies.

The bill would do away with agency-established admission requirements for licensed attorneys, and thus allow persons to be represented before all Federal agencies by counsel of their choice. It would also require the agencies to deal with the counsel so selected.

No. 22,113

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACK D. HOUGHTON,

Petitioner

ADMINISTRATOR OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE ORDER OF THE
TAX COURT OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

FILED

MAR 15 1968

WARDE E. E. III,
Attorney for

3323 S.W. 1st
Portland, Oregon

WM. B. LUCK, CLERK

CITATIONS

Cases:

Page

<u>Clark's Estate v. Commissioner,</u>	
173 F. 2d 13.	6, 7
<u>Delman v. Commissioner, decided October 10,</u>	
1967 (20 AFTR 2d 5543).	6, 7, 9
<u>Expanding Envelope & Folder Corporation</u>	
<u>v. Sholtz, 20 AFTR 2d 5758,</u>	
(CA 3 Nov. 1967).	7, 9
<u>Maxfield v. Commissioner, 153 F. 2d 325. . .</u>	3, 9
<u>Tenzer v. Commissioner, 285 F. 2d 956.</u>	3

Statutes:

Act of November 8, 1965, P.L. 89-332,	
79 Stat. 1281.	4

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,215

JACK D. HOUGHTON,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE ORDER OF THE
TAX COURT OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

The brief of respondent has been received and read, and the taxpayers' brief has also been reviewed.

One thing is amply clear:

The taxpayers at no time received any notice of a proposed deficiency, actual, or constructive, thirty-day letter; no ninety-day letter; nothing to advise them that a deficiency in tax had ever been proposed.

In this day of rapid and efficient communication it seems strange the office of District Director

of Internal Revenue who wanted to notify a person was not successful in doing so, when taxpayers each maintained separate business locations in the same city as the District Director (from whom the notice is sent) and when the taxpayers have appointed an attorney who maintains an office and home in the same city. It is even more incredible that the Oregon District Director of Internal Revenue would want to deprive taxpayers of an opportunity to object to such an important document as a proposed claim of Three Thousand Six Hundred Dollars (\$3,600.00), plus interest accumulated over a long period of years (accumulated for the convenience of the Government for which taxpayers repeatedly signed waivers and extensions at the agent's request).

The respondent's brief has been searched in vain for some explanation as to why no attempt was made to get in touch with one of the taxpayers (the agent had not had any difficulty with contacting Mr. Houghton for extensions for the Government's convenience) or the attorney?

The brief is absolutely silent in that regard.

Why, when the notice was returned undelivered could not the agent make a simple call to determine a correct address? He had called the attorney at frequent

intervals and discussed the matter with him and knew of his intention to represent the taxpayers if a deficiency was asserted.

Respondent's brief does admit that the question of "last known address" is a matter of proof in each case, (R. Br. 9) and cites, Maxfield v. Commissioner, 153 F. 2d 325, 326 (CA 9 1946). That admission represents considerable modification from respondent's position in the Tax Court.

Respondent's brief ignores completely the rule that the intent of Congress was to make a reasonable effort to assure delivery of the notice (Tenzer, supra).

To the contrary, the entire brief reduced to its essence is an attempt to convince this court that the District Director should not even make a reasonable attempt at notice even where they knew the only notice ever sent had never been received by the taxpayer nor this attorney.

No statute, no rule of law, nothing, is cited in respondent's brief which says that the District Director after notice has been returned undelivered, need do nothing more, or that he can ignore information in his own files such as power of attorney (perfect or defective and unrevoked), dealings with the attorney, whose address and telephone number were well known to

the District Director, business addresses of both clients and the attorney which were consistently recognized by the agent who also knew of the difficulty of locating one of the taxpayers due to extended business absences.

If all this is true, and a very simple effort would have located the taxpayers or given them notice, our congressional intent would be pretty shabbily avoided if the procedure suggested were to be approved by this Court.

The congressional intent is repeated, and strengthened, in the new law (Senate report) (P.L. 89-332) in which is stated:

"* * * It would also require the agencies to deal with the counsel so selected." (App. Br. 47).

But says the respondent, "while it is true the statute does not require a declaration to be in any particular form, your attorney did not file a "formal written statement containing certain information."

(Resp. Br. 15)

The statement seems to be self-contradictory. An examination of the law does not say anything about a "formal written statement," and respondent admits that no special form is required (Resp. Br. p. 15).

In this case, the attorney represented that he was duly admitted to practice in that he represented himself to be an attorney (letterhead, previous dealings, number of his Treasury card) and no person may by law practice law in the State of Oregon without being currently in good standing and be admitted to the highest court in the State of Oregon (ORS 9.160, 9.220). Since the Oregon statute presumes that the law has been obeyed (ORS 41.360 [33]), the signature of the lawyer and the use of his printed stationery constitutes a sufficient representation that he is in good standing and is admitted to the highest court in the state. The fact that the taxpayers signed a power of attorney form appointing the attorney to represent them and that it also was submitted under cover of a printed letterhead would be sufficient to show the attorney's authorization, and the taxpayers' intent to be represented for tax purposes.

While admittedly, the form of the representation was not in the form which respondent might prefer, it nevertheless was sufficient under the circumstance presented where no particular form is required, and if the District Director desired a different and more formal declaration he had ample opportunity to call any deficiency to the attention of the lawyer and the tax-

payer. Furthermore, he had the enrollment number of the attorney on the power of attorney form and could have consulted his own records if he had any doubt.

Instead, the District Director waived any such requirements and dealt with the attorney. He is estopped to assert any technical difficulties under the circumstances of this case.

But assuming that the declaration was insufficient, wouldn't it still be a reason to contact the attorney after the notice had been returned "undelivered?"

Just one question:

Why wasn't a copy sent to the attorney?

If that had been done, this problem would not be before the Court.

The respondent's brief now admits (R. Br. 12) that a notice complies with the statute if sent to address where the Commissioner reasonably believes the taxpayer wishes to be reached and cites Delman v. Commissioner, 20 AFTR 2d, 227, (CA 1 1967) and Clarke's Estate v. Commissioner, 173 F. 2d 13 (CA 1 1949).

Respondent's position previously was that notice was sufficient if sent to any address in the files of the Government unless a notice of change of address had been received.

The respondent did not previously cite the cases of Delman or Clarke's Estate and did not in this Court cite Expanding Envelope and Folder Corporation v. Sholtz, 20 AFTR 2d 5758, (CA 3 Nov. 1967).

Those cases now cited represent a change of position by respondent since the Tax Court hearing, and (at least to this writer) appear to be contrary to the position for which respondent cites them.

Those cases rather confirm the position contended by the taxpayers, to-wit: that when a taxpayer is represented by counsel, the attorney should be notified at least by a copy of the notice.

The cases cited (Delman and Expanding Envelope) present a converse factual situation to the present case in that the attorney (or accountant) was notified and the taxpayer did not take prompt action in spite of being notified by the representative (Delman v. Commissioner), and objected to the use of the attorney's address as a last known address.

In the Expanding Envelope case, the argument was opposite also to the facts of this case, in that the taxpayer took the same position as the respondent takes here; to-wit: that the consent forms contained addresses different from that of the attorney and that an agent had asked the attorney for taxpayers' correct address.

In the Enclinger case, taxpayers contended that the addresses on certain waivers and extensions constituted last known addresses rather than that of the taxpayers' lawyer, since they were filed under the power of attorney. It further contended that the agent's request for a correct address from the attorney constituted a recognition that the attorney's address was not a "last known address."

The Third Circuit rejected the argument saying:

"Neither act is any evidence from which the Service should have inferred that the taxpayers were revoking the instruction contained in the power."

Both cases would appear to hold that the appointment of a representative is such an act as would constitute a place where the taxpayers wished to be reached in connection with his tax problems.

We agree with those decisions and cite them as authority for the proposition that the attorney's address in this case was a "last known address" where the taxpayer wished to be notified regarding his tax problems.

While it is surely regretted that certain formal matters were inadvertently omitted in this situation; nevertheless, the Government should not take much comfort in that fact since the same instruments

were sufficient to provide a very simple and easy way to notify the taxpayers both before and after the 90 day notice was returned "undelivered."

A last known address does not have to come from a formal document. It may come from correspondence, directories, phone calls, agent's records, powers of attorney, or any other information. (See Mansfield v. Commissioner, regarding an address secured from stock records). It would make no difference whether or not a power of attorney was completed in the manner desired by the District Director so long as it indicated that the address is the address where taxpayer wished to be notified regarding his tax problems.

As stated in the case of Delman v. Commissioner:

"By using the phrase "last known address" Congress must have intended that notice be sent to that address where the secretary (or his delegate) reasonably believed the taxpayer wished notice to be sent."

It is not without significance that in all cases cited where notice was sent to a lawyer, the notice was held sufficient. Had a notice (whether copy or original) been sent to the lawyer here it would have been sufficient in this case.

The jurisdiction of the Tax Court would seem to be clear, or if not, it should be clear that no notice has yet been given of a proposed deficiency. The latter would give the parties a chance to properly consider the proposed assessment on giving a new notice.

Respectfully submitted,

Warde H. Erwin



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39, of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing reply brief is in full compliance with those rules.

Dated: _____ day of March, 1968.

Attorney

WARDE H. ERWIN
ATTORNEY AT LAW
200 N. 1ST ST.
SAN JOSE, CALIF. 95128
TELEPHONE 57201

March 4, 1938

Mr. Clerk
Court of Appeals
San Jose, California 95101

215
Mr. Thompson, Commissioner

I am enclosing the file on reply

Page 11 of this file says "method of preparation of reply brief" and "conform to style, method of preparation, and manner, with appellant's opening brief."

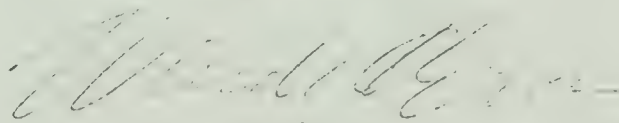
In the instant case, this was by printing.

The Court's order rules its brief in duplicating manner under the paragraph which includes "when a party is permitted, under this rule, to file typewritten briefs," and we submit the Court must have received some type of permission.

We would like to prepare the reply brief in this manner, but do we have to comply with conforming to the style and manner of the appellant's brief?

Our time will soon expire; the brief is ready for finalization, and we would therefore appreciate a reply by return mail if possible.

Yours very truly,


Warde H. Erwin

March 5, 1938

Dear Mr. Thompson:

You may file your brief in the same manner as the appellant's.

Liam B. Mack, Clerk of Court

No. 22216 ✓

In the

United States Court of Appeals

for the Ninth Circuit

AMERICAN SMELTING & REFINING COMPANY,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition to Review and Set Aside an Order of the
National Labor Relations Board

Brief of Petitioner American Smelting & Refining Company

FILED

JAN 12 1968

WML B. LUCK, CLERK

EVANS, KITCHEL & JENCKES

363 North First Avenue
Phoenix, Arizona 85003

*Attorneys for Petitioner
American Smelting &
Refining Company*

TABLE OF CONTENTS

	Page
Jurisdiction	1
(A) The National Labor Relations Board.....	1
(B) This Court	3
Statement of the Case.....	4
Specification of Errors Relied Upon.....	8
Argument	9
The Respondent Erred in Finding Petitioner Guilty of a Refusal to Bargain Collectively with the Union, as the Exclusive Representative of All of the Employees in the Bargaining Unit, with Respect to Any Changes in Rentals Charged for Petitioner's Company Housing and Trailer Parking Areas at Silver Bell, Arizona, in Violation of Sections 8(a)(5) and (1) of the National Labor Relations Act, as Amended by the Taft Hartley Act, for the Reason That There Was Insufficient Evidence in the Record Pre- sented to Show That the Rental of Company Houses, Apartments and Trailer Spaces at the Silver Bell, Ari- zona Site Was a Mandatory Subject of Collective Bar- gaining Under Sections 8(a)(5) and 8(d) of the Act, Sections 158(a)(5) and 158(d) Title 29 U.S.C.A.....	9
The Respondent Erred in Finding Petitioner Guilty of a Refusal to Bargain Collectively with the Union, as the Exclusive Representative of All the Employees in the Bargaining Unit, with Respect to Any Changes in Rentals Charged for Petitioner's Company Housing and Trailer Parking Areas at Silver Bell, Arizona, in Violation of Sec- tions 8(a)(5) and (1) of the National Labor Relations Act, as Amended by the Taft Hartley Act, for the Reason That the Record Failed to Show That Rental of Company Owned Housing Occupied by Employees and Non-Em- ployees Alike, Constituted Wages and/or Other Conditions of Employment, Pursuant to Sections 8(a)(5), 8(d) and 9(a) of the Act, Sections 158(a)(5), 158(d) and 159(a), Title 29, U.S.C.A.....	16
Conclusion	34

CITATIONS

CASES	Pages
Cedar Rapids Block Co. v. National Labor Relations Board, 332 F.2d 880 (C.A. 8, 1964).....	33
Falstaff Brewing Corporation and Oscar Gerak (1960), 128 N.L.R.B. 294	33
In the Matter of Elgin Standard Brick Manufacturing Com- pany and United Brick & Clay Workers of America, A.F.L. (1950) 90 N.L.R.B. 1467.....	32, 33
Kohler Company and Local 833, UAW-AFL-CIO, Interna- tional Union, United Automobile, Aircraft and Agricultural Implement Workers of America (1960) 128 N.L.R.B. 1062, 300 F.2d 699, cert. den. (1962) 370 U.S. 911.....	29, 30, 32
National Labor Relations Bd. v. Bemis Bro. Bag Co., 206 F.2d 33 (C.A. 5, 1953).....	21, 22, 26, 27, 28, 33, 34
National Labor Relations Board v. Hart Cotton Mills, Inc., 190 F.2d 964.....	29, 30
National Labor Rel. Bd. v. Lehigh Portland Cement Co., 205 F.2d 821 (C.A. 4, 1953).....	28, 29
W. W. Cross & Co. v. National Labor Relations Board, 174 F.2d 875 (C.A. 1, 1949).....	16

STATUTES AND TREATISES

31 Am. Jur. 627.....	33
Title 29, U.S.C.A. :	
Section 152(6)	2
Section 152(7)	2
Section 153(b)	3
Section 158(a) (1)	34
Section 158(a) (5)	2, 3, 5, 8, 9, 16, 23, 34
Section 158(d)	8, 16, 34
Section 159(a)	8, 16, 22, 24, 34
Section 160	3, 4

No. 22216

In the
United States Court of Appeals
for the Ninth Circuit

AMERICAN SMELTING & REFINING COMPANY,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition to Review and Set Aside an Order of the
National Labor Relations Board

Brief of Petitioner
American Smelting & Refining Company

JURISDICTION

(A) The National Labor Relations Board.

Local Union 13886, International Union of District 50, United Mine Workers of America (Ind.), (hereinafter referred to as "Union") filed its charge against the American Smelting & Refining Company (hereinafter referred to as "Petitioner") with the National Labor Relations Board (hereinafter referred to as "Board") on September 30, 1966, being Case No. 28-CA-1435. (T.R. 3). Thereafter a complaint issued which alleged that the Petitioner, since on or about

July 22, 1966, and thereafter, had refused to bargain with the Union by unilaterally increasing the cost of company housing, doing so without first notifying and/or bargaining with the Union, in violation of Section 8(a)(5) of the National Labor Relations Act (hereinafter referred to as the "Act"), Section 158(a)(5), Title 29, U.S.C.A. It was alleged in paragraphs 12 and 14 of the complaint that the Petitioner initiated an increase in the rents of the company homes at the Silver Bell, Arizona, townsite, without prior notice to or bargaining thereon with the Union in violation of Sections 8(a)(5) and (1), and Section 2(6) and (7) of the Act, Sections 158(a)(5) and (1) and 152(6) and (7), Title 29, U.S.C.A., respectively.

Petitioner's answer admitted that the Petitioner increased the rent for its two and three bedroom houses, but denied that said subject was a mandatory subject of collective bargaining. (T.R. 8). A hearing before the Board was held on January 17, 1967, in Tucson, Arizona, before the trial examiner. Subsequent to the hearing, both Petitioner and the Union submitted legal briefs to the trial examiner for consideration and after that the trial examiner rendered his decision on May 19, 1967. (T.R. 11). The trial examiner found that the Petitioner was in violation of Sections 8(a)(5) and (1) of the Act, Section 158(a)(5) and (1) Title 29, U.S.C.A. Thereafter, Petitioner filed its exceptions to the trial examiner's decision (T.R. 27) and a supporting brief, whereupon the Union filed cross-exceptions (T.R. 36) and a supporting brief, and the respondent filed a brief in reply to the Union's cross-exceptions. Pursuant to the provisions of Section 3(b) of the Act, as amended, Section 153(b), Title 29, U.S.C.A., the Board delegated its powers in connection with this case to a three-member panel. The Board reviewed the rulings of the trial examiner made at the hearings and found that no prejudicial error was com-

mitted. The Board considered the trial examiner's decision, exceptions and briefs, and the entire record and adopted the findings, conclusions and recommendations of the trial examiner with modifications. (T.R. 39).

The National Labor Relations Board's jurisdiction rested upon the authorization contained in Section 160, Title 29, U.S.C.A.

(B) This Court.

The Board, on August 24, 1967, entered a final order (T.R. 39) as the result of which Petitioner is an aggrieved party, and its interests adversely affected. The decision and order of the Board is designated as 167 N.L.R.B. No. 26. In its decision and order of August 24, 1967, in the foregoing case, the Board found that the trial examiner had not committed any prejudicial error in his decision and the Board affirmed the rulings of the trial examiner and adopted the findings, conclusions and recommendations of the trial examiner in the trial examiner's decision, with certain modifications noted in the Board's order.

The Board ordered Petitioner to cease and desist from:

- (1) Refusing to bargain collectively with the Union with respect to proposed changes in housing and apartment rentals at the Petitioner's Silver Bell, Arizona, operation;
- (2) unilaterally increasing rental charges of company housing at Silver Bell, Arizona, without prior notification to and bargaining with the Union; and
- (3) in any like or related manner interfering with the efforts of the Union to bargain collectively on behalf of the employees in the bargaining unit.

The Board further ordered the Petitioner to affirmatively:

- (1) Bargain collectively with the Union, upon request, as the exclusive representative of all its employees renting

said company housing with respect to any changes, now in effect or hereafter proposed, in rentals charged employees at company-owned housing and trailer parking areas at Petitioner's Silver Bell, Arizona facilities; (2) immediately reinstate the rental charges in effect prior to the unilateral increase thereof at Silver Bell, Arizona and make whole, with interest at 6% per annum, all the employees in the bargaining unit who have paid the increased rental charges; and (3) post notices stating Petitioner would not refuse to bargain collectively with the Union as the exclusive representative of all the employees in the bargaining unit with respect to any changes in rentals charged for Petitioner's company-owned housing and trailer parking areas at Petitioner's Silver Bell, Arizona facility. Petitioner filed its petition for review of the Board's decision and order of August 24, 1967, with this court on September 26, 1967. (T.R. 43). Petitioner's statement of points and designation of record were also filed on September 26, 1967. (T.R. 54). The Board subsequently filed an answer to the petition and also filed a cross-petition for enforcement of its order. (T.R. 52).

The jurisdiction of this court as to the petition for review is conferred by Section 160, Title 29, U.S.C.A.

STATEMENT OF THE CASE

Petitioner is a mining company which, as part of its Arizona operations, maintains a copper mine, crusher and concentrator at Silver Bell, Arizona, approximately forty miles northwest of Tucson, Arizona. Located near the mine is a townsite in which the Petitioner owns one hundred ninety-nine (199) dwelling units and fifty (50) trailer spaces. Of the one hundred ninety-nine (199) dwelling units, one hundred seventy-five (175) are two(2) and three(3) bed-

room houses, and twenty-four (24) are two and three bedroom apartments. As of October 12, 1966, Petitioner employed three hundred seventeen (317) persons at the Silver Bell location. Two hundred eight (208) employees lived in company housing and one hundred nine (109) lived elsewhere. It is not a requirement that the employees live at the townsite. The Petitioner maintains the townsite and pays all utilities. It also pays for garbage and trash collection. From the time when the company housing was first occupied in 1952, until September, 1966, the rent did not change. The amount which was to be charged for monthly rent was unilaterally determined by the Petitioner, and the Union at no time ever overtly claimed that it had a right to be consulted as to the amount to be charged as rent. At no time during this period did the Union attempt to interfere with the operation of the housing in any manner. The complete operation of the company housing was left solely to the discretion of the Petitioner, who made all decisions unilaterally as to its maintenance and operation. In September, 1966, the Petitioner unilaterally increased the rent on two (2) bedroom houses by five dollars (\$5.00) per month, and on the three (3) bedroom houses by ten dollars (\$10.00) per month. Rent on the apartments and trailer spaces remained unchanged. When the Petitioner raised the rent on the two (2) and three (3) bedroom houses, the Union protested, maintaining that the rent charged for company housing was a mandatory subject of collective bargaining, within the meaning of Sections 8(a)(5) and 8(d) of the Act, Sections 158(a)(5) and 8(d), Title 29, U.S.C.A. Petitioner maintained that it was not.

The hearing before the trial examiner was held on January 17, 1967, in Tucson, Arizona. At the commencement of this hearing, certain stipulations as to factual matters in-

volved were read into the record. Those stipulated facts which Petitioner feels are pertinent to the presentation of its argument are:

(1) Each occupant of a house, apartment or trailer space enters into a formal lease with Petitioner. (R.T. 9).

(2) The first labor agreement between Petitioner and the Union at Silver Bell, Arizona, was concluded on December 15, 1954, and was for a two (2) year duration. (R.T. 11).

(3) Additional labor agreements were negotiated in 1956, 1959, 1961, 1962 and 1964. The expiration date set forth in the current labor agreement is September 30, 1967. (R.T. 11).

(4) No employee of the Petitioner is required to live at Silver Bell, Arizona as a condition of his employment. (R.T. 12).

(5) As of October 12, 1966, Petitioner had three hundred seventeen (317) employees at its Silver Bell unit, of which fifty-three (53) were salaried employees and two hundred sixty-four (264) were bargaining unit employees. (R.T. 12).

(6) As of October 12, 1966, one hundred seventy-five (175) of the bargaining unit employees lived in company housing and eighty-nine (89) of the bargaining unit employees lived at locations other than Silver Bell, Arizona. (R.T. 12).

(7) Employees who do not live at Silver Bell, Arizona, whether salaried or bargaining unit employees, are paid at the same rate of pay as employees who live at Silver Bell, Arizona for their respective occupational classifications. There is no travel allowance paid to employees who do not live at Silver Bell. (R.T. 13).

(8) On July 22, 1966, Petitioner, by letter to each tenant, notified the tenants of the two-bedroom houses that their rent would be increased by five dollars (\$5.00) per month

effective August 1, 1966, and the tenants of the three-bedroom houses that their rent would be increased by ten dollars (\$10.00) per month effective August 1, 1966. No rental increases were made effective as to the apartment units or the trailer spaces. (R.T. 13-14).

(9) The Union thereafter requested negotiations concerning the Petitioner's action and a meeting was called by the Petitioner for August 17, 1966, at which meeting Petitioner told representatives of the Union that it would not bargain about its decision to increase the rents. Representatives of the Union told Petitioner not to withhold any more money from employees' pay without getting authorizations therefor. At this meeting the effective date of the rent increase was changed to September 1, 1966. (R.T. 15).

(10) The Petitioner's townsite at Silver Bell, Arizona, is approximately forty (40) miles from Tucson. The maintenance of the residences and townsite is performed by Petitioner's maintenance employees. The rents are paid by payroll deduction and all present occupants have authorized, in writing, payroll deduction for rent. (R.T. 16).

(11) Petitioner owns and operates a mine, crusher and concentrator known as the Mission Unit, approximately twenty (20) miles southwest of Tucson. There are no housing units at the Mission Unit. Wages for comparable occupational classifications at Petitioner's Mission Unit are the same as, or slightly lower than, those at Petitioner's Silver Bell operation. No travel allowance is paid to employees of Petitioner at the Mission Unit. (R.T. 19).

SPECIFICATION OF ERRORS RELIED UPON**I**

The Board erred in finding Petitioner guilty of a refusal to bargain collectively with the Union, as the exclusive representative of all the employees in the bargaining unit, with respect to any changes in rentals charged for Petitioner's company housing and trailer parking areas at Silver Bell, Arizona, in violation of Sections 8(a)(5) and (1) of the Act, as amended by the Taft-Hartley Act, Section 158(a)(5) and (1), Title 29, U.S.C.A., for the reason that there was insufficient evidence in the record presented to show that the rental of the company's houses, apartments and trailer spaces at the Silver Bell, Arizona, site was a mandatory subject of collective bargaining under Sections 8(a)(5) and 8(d) of the Act, Sections 158(a)(5) and 8(d), Title 29, U.S.C.A.

II

The Board erred in finding Petitioner guilty of a refusal to bargain collectively with the Union, as the exclusive representative of all the employees in the bargaining unit, with respect to any changes in rentals charged for Petitioner's company housing and trailer parking areas at Silver Bell, Arizona, in violation of Sections 8(a)(5) and (1) of the Act, Sections 158(a)(5) and (1), Title 29, U.S.C.A., for the reason that the record failed to show that rental of company owned housing, occupied by employees and non-employees alike, constituted wages and/or other conditions of employment, pursuant to Sections 8(a)(5), 8(d) and 9(a) of the Act, Sections 158(a)(5) and 158(d) and 159(a), Title 29, U.S.C.A., respectively.

ARGUMENT

The Respondent Erred in Finding Petitioner Guilty of a Refusal to Bargain Collectively with the Union, as the Exclusive Representative of All of the Employees in the Bargaining Unit, with Respect to Any Changes in Rentals Charged for Petitioner's Company Housing and Trailer Parking Areas at Silver Bell, Arizona, in Violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as Amended by the Taft Hartley Act, for the Reason That There Was Insufficient Evidence in the Record Presented to Show That the Rental of Company Houses, Apartments and Trailer Spaces at the Silver Bell, Arizona Site Was a Mandatory Subject of Collective Bargaining Under Section 8(a)(5) and 8(d) of the Act, Sections 158(a)(5) and 158(d) Title 29, U.S.C.A.

At the hearing before the trial examiner in this case, the burden of proof was upon the General Counsel to show, by a preponderance of the evidence, that the rental of company houses by the Petitioner to its employees was a "condition of employment" or that the rent charged was of such a nature as to constitute an "element of wages". If the General Counsel failed to prove one of these then there were no violations of Sections 8(a)(5) and (1) of the Act, Sections 158(a)(5) and (1), Title 29, U.S.C.A., and the trial examiner should not have rendered a decision against the Petitioner, and the Board should have found that the Act had not been violated.

A review of pertinent parts of the record emphasizes the fact that the Union had not seen fit in the past to interfere in any aspect of the operation of the company housing. Mr. Albert W. Avenetti, the first of two witnesses called by the Union (R.T. 31) was first employed by Petitioner in 1954 for seven (7) months (R.T. 34) then again in 1956-57 for approximately seventeen (17) months (R.T. 34), and for a third time in 1959 up until he went on the staff of the Union in October of 1965. For approximately five (5) years prior

to October, 1965, Mr. Avenetti lived in Silver Bell in a three bedroom house. (R.T. 34). While employed by Petitioner in 1956 he did not live at the townsite, but in Tucson. (R.T. 35). Mr. Avenetti testified that in 1956 he held a position as recording secretary with the Union and was also on the negotiating committee, and that he participated in the negotiations in 1956. (R.T. 41). Mr. Avenetti testified that at these negotiations a Mr. Sabatino, an International Representative and chief negotiator of the Union, "wanted it clarified and in that respect assurance from the company that rents would not be increased so as to off-set any increase in pay that might be arrived at from negotiations." (R.T. 41). He further testified that at the 1959 negotiations the rental of property was again brought up when Mr. Avenetti (at that time President of the local union) asked Mr. Jameson for a reassurance that the rent would not be increased, and that Mr. Jameson gave him such reassurance. (R.T. 43). Then again, in the 1961 and 1962 sessions, Mr. Avenetti testified, the company reassured the Union, upon being asked for such reassurance by the Union, that the rent would not be increased, but that the Petitioner would not give a letter to that effect or enter it into the contract. (R.T. 43). Mr. Avenetti also testified that in the 1964 negotiations Mr. Jameson again conceded, under questioning by the Union, that the rents would not be increased. (R.T. 44). But on cross-examination, Mr. Avenetti was asked by counsel for Petitioner if he ever gave an affidavit to anyone regarding the instant matter, to which Mr. Avenetti replied that he had given one to Mr. Roy Garner of the Board. (R.T. 55). The affidavit was then produced and through extensive cross-examination as to the contents of this affidavit, counsel for Petitioner elicited from Mr. Avenetti that the only statement included in the affidavit by Mr. Avenetti was that

supposedly made by Mr. Purvis in 1956, but that Mr. Avenetti had made *no* mention in his affidavit of the statements which Mr. Avenetti testified were made by Mr. Jameson in 1959, 1961, 1962 and 1964. (R.T. 52-55). It seems strange to Petitioner that Mr. Avenetti would have failed to include these important facts in his affidavit made for this instant case and then later testify that such statements were made by Mr. Jameson. Because this affidavit was introduced and admitted in evidence (R.T. 57) for the purpose of determining the credibility of the witness' testimony, it should be seriously considered in determining whether or not any such statements were ever actually made by Mr. Jameson. It appears they were not or Mr. Avenetti would surely have included them in the affidavit which he furnished in connection with the investigation and preparation of the case. This is further emphasized by the fact that Mr. Avenetti made handwritten additions, by way of interlineation to this affidavit, at the time of signing, *but at no time included the prior conversations at the bargaining table when Mr. Jameson supposedly stated that the Company would not increase the rent!*

Grave doubts are also cast on the testimony of Mr. Avenetti after reading the testimony of witnesses called by the Petitioner. Mr. Robert B. Meen testified that he is presently the Southwestern Manager of the Mining Department of Petitioner and was assigned to the Silver Bell mine from 1952 through July of 1959 as chief engineer, mine superintendent and superintendent. (R.T. 66). He testified that he had sat in on all negotiating sessions up until July, 1959. (R.T. 66). Mr. Meen also testified that he was present at the 1956 negotiations and that he had no recollection of Mr. Sabatino asking Mr. Purvis for assurance that rent at Silver Bell would not be increased

nor that Mr. Purvis ever stated that the rents would not be increased. (R.T. 67). This testimony is directly opposed to that of Mr. Avenetti. Mr. Meen's further testimony, unrefuted, showed that the Union never performed any overt act indicating it desired to bargain with the Petitioner concerning the company housing operations. Because of the importance of these statements, Petitioner will quote the applicable portions.

R.T. 70, lines 6-13:

"Q. (By Mr. Boland) Mr. Meen, in participating at the bargaining for Silver Bell has there ever between the parties been any discussion of a tie between wage rates and the rental at the housing facilities?

A. *I recall none.*" (Emphasis supplied)

R.T. 72, lines 12-25:

"Q. Mr. Meen, at any anniversary negotiating meeting which you participated in has the union ever submitted any demand which related to any aspect of the operation of the townsite?

A. I recall none.

Q. That would include rentals and services provided; is that correct?

A. That is correct.

Q. *At any anniversary negotiations, whether there were any demands submitted or not, have the two parties ever bargained about any aspect of the operation of this townsite?*

A. *We have never bargained about aspects of the townsite.*

Q. *That includes rentals, services provided and everything else; is that right?*

A. *That is right.*" (Emphasis supplied)

Mr. Meen further testified that for a considerable period of time before 1957 the mining at the Silver Bell site was contracted out to Isbell Construction Company and that the

Isbell employees occupied about 50 per cent of the company houses (R.T. 73) with Petitioner's employees occupying the balance, but that there was no distinction in the rent charged to Isbell employees as compared to Petitioner's employees. (R.T. 74).

Mr. Russell Salter was called as a witness by Petitioner. (R.T. 80). Mr. Salter has been the mill superintendent at Silver Bell for approximately eleven years and was assistant superintendent prior to that time. (R.T. 81). From the time the Union was originally organized until the present Mr. Salter participated in the anniversary negotiations. (R.T. 81). He too had no recollection of the conversation between Mr. Sabatino and Mr. Purvis with reference to the rent not being increased at Silver Bell. (R.T. 82). He further testified at *R.T. 82, lines 9-24*:

"Q. Have you had occasion to review the union demands every year?

A. Yes.

Q. Has there ever been an occasion when the union submitted a written proposal with reference to the housing or any aspect of the housing?

A. I do not recall any at all.

Q. Are you familiar with whether or not the company ever made any written proposals to the union?

A. To my knowledge they have never made any.

TRIAL EXAMINER: *With regard to that same question that counsel just asked you, were any oral or spoken proposals made that you heard of with regard to rental?*

THE WITNESS: *No, I do not recall any of them.*

TRIAL EXAMINER: *Written or oral?*

THE WITNESS: *As to written or oral."* (Emphasis supplied).

This testimony further discredits that given by Mr. Avenetti, and it supports the testimony of Mr. Meen that no

statements were made at the negotiations regarding increase in rent of the company houses.

The final witness called by the Petitioner was Mr. Donald R. Jameson, presently superintendent of the Silver Bell Unit. (R.T. 84). Mr. Jameson participated in the 1959, 1961, 1962 and 1964 anniversary negotiations between the Petitioner and the Union. (R.T. 85). When asked by counsel for Petitioner as to whether Mr. Avenetti specifically asked Mr. Jameson in 1959 for an assurance that the rent at the Silver Bell Unit would not be increased, Mr. Jameson testified that he recollected no such question or answer of that nature. (R.T. 85).

In further repudiation of Mr. Avenetti's testimony, Mr. Jameson testified at *R.T. 85, line 23 to R.T. 87, line 4*:

“Q. Do you remember any questions at that time or in those negotiations concerning the rental of houses?

A. No.

Q. If I were to ask you the same question with reference to 1961 or 1962, in whatever year they were held, what would your answer be?

A. The same thing.

Q. And if I were to ask you the same question about Mr. Avenetti's testimony with reference to 1964, what would your answer be?

A. The same.

Q. Have you participated in negotiations in each year before 1964?

A. Before 1959?

Q. Including 1959?

A. Yes.

Q. Did you receive any written proposals during each of these years?

A. Yes.

Q. In any one of these years did the union submit a proposal in any way related to the rental or the operation, or any aspect of the townsite?

A. No.

Q. *Did the company at any time ever submit a proposal, verbal or written, relating to its operation of the townsite?*

A. No.

Q. *Did the union at any time during any negotiation ever submit any kind of a verbal proposal with reference to the rents or other operations at the townsite?*

A. *Not to my knowledge.*

Q. *At any time in any negotiation, Mr. Jameson, has there ever been anything relating rental to wages negotiated between the parties?*

A. No." (Emphasis supplied)

Mr. Jameson further testified that in none of the documents given to the men when they were hired was there a mention of the housing available, (R.T. 95) nor were the men in any way advised or made aware of the company housing when they were hired. (R.T. 84).

The only directly concerned person who has not come forward and denied Mr. Avenetti's testimony about events occurring during negotiations is Mr. Purvis, who, as was brought out during the cross examination of Mr. Avenetti, is dead. (R.T. 53).

From a review of the evidence thus far, it is crystal clear that the Union did *not*, by a preponderance of the evidence, show that the Union performed a single act since it obtained bargaining rights in 1954 to show that it desired to bargain collectively with the Petitioner regarding any aspect of the operation of the company housing. No objection was raised when the Petitioner permitted "outsiders" to live in the homes throughout the years on an equal rental basis. The quoted testimony also shows that although collective bargaining regarding the company houses might have been

considered at many of the negotiating meetings as a permissive subject of bargaining and incorporated in the written agreements, that such was never brought in by the Union officials. Therefore, as to this aspect of proof the Union failed to meet its burden of proof.

The Respondent Erred in Finding Petitioner Guilty of a Refusal to Bargain Collectively with the Union, as the Exclusive Representative of All the Employees in the Bargaining Unit, with Respect to Any Changes in Rentals Charged for Petitioner's Company Housing and Trailer Parking Areas at Silver Bell, Arizona, in Violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as Amended by the Taft Hartley Act, for the Reason That the Record Failed to Show That Rental of Company Owned Housing Occupied by Employees and Non-Employees Alike, Constituted Wages and/or Other Conditions of Employment, Pursuant to Sections 8(a)(5), 8(d) and 9(a) of the Act, Sections 158(a)(5), 158(d) and 159(a), Title 29 U.S.C.A.

The evidence further proves that the rent charged was not of such a nature as to constitute an element of wages. The term "wages", as used in Section 9(a) of the Act, Section 159(a), Title 29, U.S.C.A., "embraces within its meaning direct and immediate economic benefits flowing from the employment relationship." *W. W. Cross & Co. v. National Labor Relations Board*, 174 F.2d 875, 878 (C.A. 1, 1949). It is Petitioner's firm contention that the General Counsel failed to show, in any way whatsoever, how there was any direct and immediate economic benefit flowing from the Petitioner to the employees as the result of the rental of the company housing. The stipulated facts included previously herein show that those employees living on the premises received the same pay as those living elsewhere. (R.T. 13). Furthermore, Mr. Meen and Mr. Jameson both testified that since the inception of the townsite, persons other than employees of Petitioner have been per-

mitted to live in the company houses, and that the rent has been the same for everyone. Actually, prior to 1957, half of the housing was occupied by persons who were not employees of Petitioner and during those years, as now, the non-employees paid the same rent as employees. (R.T. 73, 74). There was absolutely no evidence presented that the employees paid less rent than they would have if they lived in similar houses in the surrounding or nearby communities, nor was there any evidence presented as to what would be a surrounding community of which a comparison could be made. The only attempt to show comparable rentals for houses was the Union's Exhibit No. 8 for identification, which purported to be portions of the classified section of the July 22, 1966, and August 26, 1966, editions of *The Arizona Daily Star*, which the Trial Examiner ruled was complete hearsay, and thus inadmissible. (R.T. 31-33). Counsel for the General Counsel then attempted, through Mr. Avenetti's testimony, to establish a comparison of the rent in Tucson, Arizona, in relationship to the rent at Silver Bell (R.T. 36-39), but, upon objection by counsel for Petitioner, the Trial Examiner ruled this testimony to be completely irrelevant to the issue and that Mr. Avenetti was not an expert capable of testifying about prevailing rates of rent of comparable houses in different areas. (R.T. 39). The General Counsel called as a witness Mr. Wayne Anderson, presently employed by Petitioner and now the president of the local union. (R.T. 59). Mr. Anderson testified that there were two other communities closer to the Silver Bell location than Tucson, these being Marana and Cortaro, both approximately 25 miles from the Silver Bell townsite. Mr. Anderson disclosed that six (6) employees were then living in Marana and two (2) in Cortaro, (R.T. 63); that both were just small communities of private homes, businesses and schools. (R.T. 63). The Union never attempted to establish

the prevailing rental rates for similar dwellings in these two communities, which would certainly have been the most logical thing to do to establish the Union's case. These two towns were much closer than Tucson to Silver Bell and presumably the living conditions would have been more similar to Silver Bell than those in Tucson. Since there were employees living in these two towns already, it is apparent that homes were available. The only conclusion that can be reached as to this point is that the Union failed to carry the burden of establishing that the prevailing rental rates in the surrounding communities were more than those at Silver Bell for comparable housing.

Furthermore, if the rent for these homes were to constitute "wages" there would have to be consideration flowing to the employer from the employees for the benefits received by the employees, for it is primary that wages must in some way be earned by the employees. Again, the record is devoid of evidence that Petitioner benefited in any way from the company housing other than through a landlord-tenant relationship. In fact, the record shows that none of the employees were required to live in the company houses, nor could the Petitioner compel the employees to live in the houses. The testimony of the Union's witnesses clearly showed this. Compare the cross-examination testimony of Mr. Anderson, (R.T. 64, line 21 to R.T. 65, line 3) which also includes the Union's stipulation on this point:

"Q. When you moved into Tucson was it your own choice to do so?

A. Yes, it was.

Q. Is it not correct, Wayne, that there is no requirement that any employees live in Silver Bell, requirement made by the company, I mean?

MR. HARRIS: I will stipulate to that. It is cumulative."

The General Counsel earlier attempted to show benefits derived by the Petitioner from having employees live in company housing through testimony by Mr. Anderson about a maintenance man living at Silver Bell who was given a certain emergency job to perform, which should have been given to another employee living in Tucson. (R.T. 60). Mr. Anderson testified that the employee who was living in Silver Bell, and who was asked to assume the emergency task, was *working on the job at the time the emergency arose*. (R.T. 60, lines 8-12). Therefore, whether or not he was living at Silver Bell was entirely irrelevant, and the trial examiner so ruled. (R.T. 62).

The evidence also proved that the fact that Petitioner rented company houses to the employees did not in any way affect the wage scale at the Silver Bell operation, but instead established that the wages at Silver Bell followed the ordinary wage pattern for large mining companies. Counsel for Petitioner offered Petitioner's Exhibit No. 2 for identification, which was the then current labor agreement between Pima Mining Company and the Union representatives. (R.T. 68). It was offered for the purpose of showing that there is no differential between the wage rates at Silver Bell and at Pima Mining Company. Further, the Pima Mining Company property is 23 miles southwest of Tucson and there are no housing facilities at Pima, which would be evidence that no variance in the pay scale exists by reason of the fact that Silver Bell offers housing to its employees while Pima does not. (R.T. 69). Further testimony elicited from Mr. Meen on this aspect was to the effect that Silver Bell's anniversary date is always some months later than the anniversary dates for the other copper producers in the district. (R.T. 70). When asked how the wages at Silver Bell were determined, Mr. Meen declared, *R.T. 71, line 8 to R.T. 72, line 11*:

"A. Well, the pattern has been mostly set by other companies and we more or less follow along with them.

Q. When you say other companies do you mean large copper companies in the state?

A. Yes.

Q. Are some of these companies which have no housing?

A. That is right.

Q. And some of them which are in remote areas; is that right?

A. That is right.

Q. And all of them . . . strike that.

Although some of them that are in remote areas do, in fact, have housing; is that right?

A. I believe so, yes.

Mr. Harris: Mr. Trial Examiner, I am going to object to this line of questioning. We are here to determine not the way the employer bargains and why he bargains the way he does but what he has not bargained about, which we contend is a proper matter for bargaining, and we don't see how this testimony is relevant to that issue.

Trial Examiner: Overruled.

Q. (By Mr. Boland) Does Pima have housing on its property?

A. I don't believe they do have.

Q. It has been testified it is about 23 miles southwest of Tucson; is that right?

A. That is right.

Q. To your knowledge, is a travel allowance paid to Pima employees for traveling between Tucson and Pima?

A. Not at the present time."

Mr. Meen further testified that at none of the anniversary negotiations between Petitioner and the Union did the Union submit any demand relating to any aspect of the operation

of the townsite, including rentals and services provided. (R.T. 72).

A stipulation in the record which was accompanied by the Union's Exhibit No. 7 for identification (R.T. 19) further supports Petitioner's contention that the rentals of the company houses played no role in wage rate determination at Silver Bell. The stipulation is that Petitioner owns another similar operation called the Mission Unit, about 20 miles southwest of Tucson; that there are no housing units there; and that "[W]ages for comparable occupational classifications at Respondent's Mission Unit are the same or slightly lower than those at Respondent's Silver Bell Operation. No travel allowance is paid to employees of Respondent at the Mission Unit." (R.T. 19, lines 14-18). The Union's Exhibit No. 7 for identification, admitted in evidence without objection (R.T. 28) was a copy of the agreement between the Mission Unit officials and the Unions having representation rights at the Mission Unit.

No other evidence was brought forward by the Union to show any benefit to the Petitioner through rental of the company housing. The only conclusion that can be drawn from the evidence produced was that there was purely a landlord-tenant relationship, and that because the circumstances had not changed up to the time of this hearing, the relationship was also the same. Furthermore, in *National Labor Relations Bd. v. Bemis Bro. Bag Co.*, 206 F.2d 33, 37, (C.A. 5, 1953), a case on "all fours" with the instant case, the Court, in considering whether such rentals would be classified as "wages" under the statute, declared:

" 'Wages' may be a direct or indirect compensation or emolument for the work performed. If it is shown that rentals are so low that they are in fact a partial compensation such rentals would properly fall within the statutory requirement. In such a case, as said in

N.L.R.B. v. Hart Cotton Mills, 4 Cir., 190 F.2d 964, 972, in many mills such houses are a necessary part of the enterprise and where they are maintained by the employer and 'rented at such rates to the employees as to represent a substantial part of their remuneration' they become a subject of bargaining."

The Court in *Bemis*, supra, held that the evidence did not prove that the rentals constituted "wages". The evidence herein fails to establish this also. There was no evidence to show that the rentals were so low that they would constitute partial compensation, nor that such houses are a necessary part of the enterprise. The record fully supports this position. With a lack of such necessary evidence, it cannot be found that such rental constituted "wages" under the Act.

The final question that must be answered is whether the Union proved that the rental of the company houses constituted "other conditions of employment" under Section 9(a) of the Act, Section 159(a) Title 29, U.S.C.A. This issue was also considered in *National Labor Relations Bd. v. Bemis Bro. Bag Co.*, supra. In said case, the respondent bag company informed its employees that it intended to restore rentals of its houses to the 1949 rate, to which the union protested, declaring that the matter of rentals and occupancy of such houses was a mandatory subject of collective bargaining. The respondent employer contended that, *under the circumstances*, the matter solely concerned a landlord and tenant relationship which it considered a non-bargainable issue. Only two witnesses testified, the respondent's assistant general manager for the respondent, and one of respondent's employees for the union. The trial examiner found the facts insufficient to establish that the housing condition was a matter of mandatory bargaining, thus the respondent had not refused to bargain with the union in good

faith and recommended dismissal of the complaint. The Board, basing its determination on its belief that the terms and conditions of company housing were *ipso facto* a subject of mandatory bargaining, found that respondent's refusal to bargain concerning the housing rentals was a violation of Section 8(a)(5) of the Act, Section 158(a)(5), Title 29, U.S.C.A. The Court of Appeals, in denying the Board's petition for enforcement, held, p. 35:

"We find the record *insufficient in facts* to authorize the Board's conclusion in this case." (Emphasis supplied)

The pertinent facts submitted to the Court and applied by the Court in reaching its decision were that the respondent owned a plant site approximately two miles from Talladega, Alabama. Around the plant were located dwelling units, a dairy farm, a garage and filling station, a library, grocery store, school and recreational facilities. There were 195 houses containing approximately 295 to 300 dwelling units. Of a total of 750 to 900 union employees, approximately 325 to 340 lived in company houses and occupied about 250 of the 300 dwelling units. The Court further found, at pp. 35-36:

"The remaining units, except for those rented by two ministers who serve the village, and by the manager of the retail store located in the village, are rented to clerical and supervisory employees of the company. Thus all units are leased to employees except for the ministers and the store manager. Approximately 65% of the employees in the bargaining unit live outside the village. They either own their own homes, or are renting from landlords other than the respondent. The houses involved rent from \$13.25 for a two-room unit to \$25.50 for a six-room unit. The record fails to show whether these rentals are more or less than those charged for comparable houses in the vicinity rented by others." (Emphasis supplied)

There was a waiting list of approximately 80 applicants. The plant was served by the public transportation, but a survey showed that only 48 out of more than 1,000 employees utilized such means of transportation, the remainder traveling in private automobiles.

Giving a general definition of "conditions of employment" under Section 9(a) of the Act, Section 159 (a), Title 29, U.S.C.A., the Court stated, pp. 36-37:

"The language of the statute, which requires bargaining with 'respect to wages, hours, and other terms and conditions of employment,' § 8(d), or in 'respect to rates of pay, wages, hours of employment, or other conditions of employment,' § 9(a), clearly contemplates matters and things which arise out of, and may properly be considered a part of, the employment relations,—the business in which the employer and the employee participate *as necessary and essential components in the furtherance of the enterprise. The Act contemplates the relationship in the work of the enterprise and the engagement of the employer and employee in its prosecution.* Conditions under which this employment is, or should properly be, carried on, including those generally accepted as provisions proper to the discharge of the mutual obligations of the employer and employees, or even those which might be deemed fairly debatable which relate to the actual business operation, are within the provisions of the statute as 'conditions of employment.' " (Emphasis supplied)

Remarking about whether rental of company houses comes under "conditions of employment" the Court reasoned, p. 37:

"* * * *It is true, of course, that living standards and conditions may well be said to have a direct connection with a person's well being and efficiency, but this does not establish that an employee's living expenses or means of residence are conditions of employment. Indeed, if so, it would seem to result that no matter where,*

or how, the employee lived such items, or means of securing them, would be conditions of employment and they would apply as well to the two-thirds of the respondent's employees who do not occupy company-owned houses as to the one-third who do.

"It is, of course, true that there are situations where the employee may not have freedom of choice in securing living accommodations. This may result either from express requirement of the employer or where other housing is unavailable and which requires occupancy of company housing if there is to be any employment. Where this situation exists, the terms and conditions of occupancy or tenancy can well be said to be a condition of employment. *However, before such occupancy and its consequences becomes a condition of employment there must be some necessity, either imposed by the employer or by the force of circumstances, which requires the employee to subject himself to the condition of occupancy of company housing.*" (Emphasis supplied)

Applying the above reasoning to the facts of the case, the Court concluded, p. 37:

"In this case the evidence that other adequate housing is available in the community is not contradicted. *There is no evidence that the rentals charged by the respondent are in any degree less than those charged for comparable housing in the vicinity.* In these circumstances the fact that the employer confines the rental of its houses to employees does not alone make the conditions of tenancy a condition of employment, *nor, where there is no compulsion, either by express requirement or resulting in fact from circumstances which in reason require the employee to live in a company house, the conditions of tenancy of such houses which a minority of the employees may, but are not required to, occupy is not a condition of employment within the contemplation or purpose of the statute. The*

element of necessity is of course not material as to features of the employer-employee relationship which inhere in the actual employment,—the carrying on of the business. These concern and relate to the business, the employment, directly, and not incidentally, as does the company housing now for consideration under the facts of this case. One concerns a business operation. The other pertains to living conditions during off-hours when the employee is free to pursue his personal life as he may prefer.” (Emphasis supplied)

In concluding, the Court further found, pp. 37-38:

“The brief for the Board recites the genesis and status of the mill village as a necessary adjunct of the mill enterprise. We can recall instances where the village is an essential part of the business operation. We have in mind others where the company-owned houses have been disposed of and subsequently tenanted by non-employees without any interruption or detriment to the business enterprise. We think each case must be determined upon its particular facts. On this record, which fails to show that rentals are so low as to be partial remuneration for services and, therefore, in effect, wages, or, for any reason save individual choice why one-third of the employees occupy company housing, we are unable to hold that the terms and conditions of such occupancy are comprehended within the statute’s designation of ‘wages’ or other ‘conditions of employment.’

“We find the Board’s order without sufficient support in the facts and accordingly deny the petition for its enforcement.

“Enforcement denied.” (Emphasis supplied)

The factual circumstances of the instant case could hardly be more similar with *Bemis, supra*. The only distinction of any importance seems to be that in *Bemis* the town was located next to the plant, whereas here the nearest towns

were about 25 miles away and that one-third of the employees occupied the company dwellings in *Bemis* whereas approximately 65% of the employees occupied Petitioner's houses. But the Court does not give emphasis to these points, nor should they be given here. In *Bemis*, the record established that all of the dwellings were occupied by bargaining unit employees, except for a few dwellings occupied by the ministers of the village, the manager of the retail store and the clerical and supervisory employees of the company—the same situation exists in the instant case. In *Bemis*, the record failed to show whether the rentals were more or less than those charged for comparable houses in the vicinity rented by others—the General Counsel failed to prove this point in the instant case also. There was a waiting list in *Bemis*—there is a waiting list here for houses, though no waiting list for apartments. There was no testimony in *Bemis* that homes in other vicinities were not available—there was no testimony to that effect in the instant case. Also, an important distinction, which supports Petitioner's position here, is that in *Bemis* the houses were rented to company employees only, whereas here the testimony is that homes are rented, and in the past have been extensively rented, to "outsiders", which further shows that this was not a condition of employment. The best example of the Petitioner's unilateral action of allowing "outsiders" to rent company houses was its act of permitting Mr. Avenetti to live in a company house for *six to eight weeks* after his employment with American Smelting & Refining Company terminated. (See the stipulation of facts as to Albert W. Avenetti's testimony on cross-examination, which was obliterated on the tape recording of the record in this case.) (T.R. 31) It is stated in the stipulation "That in his later period of employment, i.e., 1959 to October of 1965,

he again lived in a company house at Silver Bell, Arizona: *that when he finally terminated his employment with Respondent in October, 1965, to accept a full time position with District 50, United Mine Workers of America, he was permitted to live in the company house at Silver Bell, Arizona, for a period of six (6) to eight (8) weeks after the termination of his employment, and that during this period of time, after his termination, he continued to pay the same rent which he had paid while he was still an employee of Respondent.*" (R.T. 31). (Emphasis supplied)

National Labor Rel. Bd. v. Lehigh Portland Cement Co., 205 F.2d 821 (C.A. 4., 1953) is the only other case Petitioner has found regarding rent increases of company housing as a mandatory subject of collective bargaining. In that case the Court enforced the Board's order directing the company to cease and desist from refusing to bargain collectively with the Union in respect to the rentals, but the evidence therein was sufficient to justify such a decision, which was not true in *N.L.R.B. v. Bemis Bro. Bag Co.*, *supra*, or in the instant case. The facts were that housing in the area was in short supply, thus a demand for company houses; that rent for the houses was uniformly low; that it was more convenient living nearer to the place of work than the great majority of the employees who lived off of the premises, which created substantial advantages which affected the employees' conditions of employment. The Court granted the Board's order because of this evidence, which is apparent from the last sentence of the opinion, pp. 823-824:

"Under the circumstances of this case the matter is of sufficient importance as to require its submission to the process of collective bargaining." (Emphasis supplied)

If these facts had not been in evidence the Court would have held otherwise. Suffice it to say, none of the relevant and pertinent facts are in evidence in the instant case as were in *Lehigh, supra*. Therefore, the decision in *Lehigh* cannot be controlling here.

Petitioner believes that the only other Court of Appeals cases which are concerned with the matter of company housing as a subject of mandatory bargaining are *National Labor Relations Board v. Hart Cotton Mills, Inc.*, 190 F.2d 964, (C.A. 4, 1951), and *Kohler Company and Local 33, UAW-AFL-CIO, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* (1960) 128 N.L.R.B. 1062, 300 F.2d 699, cert den. (1962) 370 U.S. 911. In *Hart, supra*, the employer threatened striking employees with loss of employment and eviction from company housing. The case did not involve a proposed increase in the rent for company housing. The Court held that under the facts presented the occupation of company housing was not a mandatory subject of collective bargaining. The Court, by way of dictum, did say that under certain circumstances company housing is a proper subject of collective bargaining; compare p. 972:

“In many mills such houses are a *necessary part of the enterprise* and in this instance they were *maintained by the employer and rented at such rates to the employees as to represent a substantial part of their remuneration*. (Emphasis supplied)

Again, the Court has set down certain criteria which must be shown to justify collective bargaining, but which have not been proven to exist here. There was no evidence that the Silver Bell houses “were a necessary part of the enterprise” and the great weight of the evidence, brought forth herein, refutes beyond any doubt the contention that these

houses are "maintained by the employer and rented at such rates to the employees as to represent a substantial part of their remuneration." It is crystal clear that the General Counsel failed to meet the Court's standards in determining when company housing is a mandatory subject of collective bargaining.

Kohler, supra, also gives full support to Petitioner's case. Like the *Hart* case, the *Kohler* case involved the eviction of striking employees from company housing. It did not involve a proposed increase in rent for company housing. In the *Kohler* case the company employed some 3,300 employees. The plant was located near a town of 4,500. The company owned a hotel near the plant, and certain employees lived there. After a strike commenced in the plant, the employer asked some of the striking employees living in the hotel to move out due to a "shortage of rooms" for persons "actively employed" by the company. Also the leases on certain dwelling units owned by the Company and occupied by striking employees were not renewed by the employer, striking employees being asked to vacate the premises. After examining the actions of the employer with regard to striking employees occupying company housing, the Board concluded that the occupancy of the hotel was *not* a condition of employment. 128 N.L.R.B. 1188. The most pertinent aspect of the Board's decision was concerning one employee, Faas, who had leased a dwelling and garden plot from the respondent-employer. The Trial Examiner found that Faas' tenancy constituted a condition of employment, basing his finding on the following factors in the record, 128 N.L.R.B. 1092-1093:

"Faas had worked for the Respondent for 18 years, had rented houses from Respondent for 9 years, and the house for which he received the eviction notice for

5 years. Faas' lease of December 29, 1952, contained the following proviso:

"This lease is entered into by Lessor because of the employment by Lessor of Lessee, and for this reason the annual rent is fixed at the sum named herein. If the Lessee should at any time, voluntarily or involuntarily, quit the service of the Lessor, or decline or refuse to perform the work for which said Lessee is employed, or the Lessor for any reason desires possession of said premises; in either of said events Lessor shall have the right to terminate this lease and reenter upon and take possession of said premises, upon thirty (30) days written notice to vacate said premises, either given to the Lessee in person or by leaving a copy of said notice upon said premises.

"When Faas' lease was renewed for another year in December 1953, the foregoing clause was omitted, although the rental was continued at the same rate of \$40 per month. The Trial Examiner found that even though the proviso was taken out of the subsequent lease, as the rent remained the same despite the fact that since December 28, 1952, there had been an average increase in rents, nationwide, of 5.7 percent, Faas' employment continued to enter into the fixing of the rental in the later lease and was therefore inseparably linked with the terms and conditions of his employment.

"The Respondent contends that as the clause was omitted it would be contrary to basic contract construction to hold that although the lease was changed, the parties intended only to accomplish a nullity by making the change, or to find that because all provisions of the lease were not changed the provisions that were changed must be ignored. We find merit in the Respondent's contention. Moreover, the record contains no evidence showing the rents of other tenants, em-

ployee or nonemployee, were increased from 1952 to 1954. Nor does the record show that Faas otherwise received more favorable consideration than other tenants because of his employment by the Respondent." (Emphasis supplied)

When the express employment provision was taken out of the lease the Board found that the condition of employment had vanished and Faas was deserving of no more rights than any other tenant of the employer, *which included "outsiders."* Certainly in the instant case, where no such provision was ever put in the lease, the Board should not have found differently. Also, here, as in *Kohler*, there is no evidence in the record showing any rent increase for anyone, *including nonemployees*, until the present increase. When this present increase occurred it was applied to all tenants, including employees and nonemployees alike. Also, there is no evidence in the record here that employees received "more favorable consideration than other tenants" because of their employment by Petitioner. Again, the record proves that the General Counsel failed to show "a condition of employment" under standards established by the Board decisions as well as Court opinions.

The sole case Petitioner has found which lends any credence at all to the Union's position under the factual situation is *In the Matter of Elgin Standard Brick Manufacturing Company and United Brick & Clay Workers of America, A.F.L.* (1950) 90 N.L.R.B. 1467. Many facts and circumstances of *Elgin* differ from the instant case. In the *Elgin* case the respondent employer owned 59 dwelling units which were rented only to employees. No lease was ever required of the tenants before, and the respondent employer requested that each tenant sign a lease or surrender possession of the premises. The record does not state how many employees

worked for the company or how many employees were in the bargaining unit. Neither does the record state where the housing was located, whether there was a waiting list for company housing, whether a town was nearby, whether there was public transportation to a nearby town, or whether vacant housing was available in the vicinity of the plant. Furthermore, *Elgin*, decided July 28, 1950, did not have *National Labor Relations Board v. Bemis Bro. Bag Co.*, 206 F.2d 33, (C.A. 5, 1953) as a guide, which now it presumably would follow. It is apparent that with the scant facts in the *Elgin* case, confronted with the *Bemis* decision, the Board erred by ruling the same way without more substantial facts in evidence upon which to base its decision. It is highly debatable today that the Court of Appeals would enforce the Board's order in *Elgin*. There would not be an adequate record to show that, by a preponderance of the evidence, counsel for General Counsel had sustained its burden of proof.

It is elementary that the burden of proof in an unfair labor practice proceeding rests upon the General Counsel, *Cedar Rapids Block Co. v. National Labor Relations Board*, 332 F.2d 880 (C.A. 8, 1964). A review of the record shows that there is a complete failure of proof of the 8(a)(5) and (1) charges embodied in the complaint. This failure of proof should have caused the Board to find Petitioner innocent of the charges, for, as stated in 31 *Am Jur.*, *LABOR*, § 299, p. 627:

“Board orders must be based upon ‘the preponderance of the testimony taken.’”

This burden is carried only when the General Counsel proves the charges by a preponderance of the evidence; *Falstaff Brewing Corp.* and *Oscar Gerak* (1960) 128 N.L.R.B. 294. It was not enough for the General Counsel merely to allege

and prove that the Petitioner refused to bargain collectively about the rent increase at the Silver Bell townsite. The federal cases cited above, and in particular the most pertinent, *National Labor Relations Board v. Bemis Bro. Bag Co.*, 206 F.2d 33 (C.A. 5, 1953), require that sufficient evidence be presented to show that the rental of houses is a mandatory subject of collective bargaining under Section 8(a)(5) of the Act, Section 158(a)(5), Title 29, U.S.C.A. These cases destroy any theory that company housing is, *ipso facto*, a mandatory subject of collective bargaining.

CONCLUSION

Petitioner respectfully submits, for all the foregoing reasons, that the order of the Board should be set aside and made of no force and effect and that the Board be ordered to issue an order that:

A. Petitioner did not violate Sections 8(a)(5) and (1) of the Act, Sections 158(a)(5) and (1), Title 29, U.S.C.A.;

B. That the rental of company housing by Petitioner at the Silver Bell, Arizona, facility was not a mandatory subject of collective bargaining under Sections 8(a)(5) and 8(d) of the Act; Section 158(a)(5) and 8(d), Title 29, U.S.C.A.; and

C. That the rental of said housing does not constitute wages and/or other conditions of employment under Section 8(a)(5), 8(d) and 9(a) of the Act, Sections 158(a)(5), 158(d) and 159(a), Title 29, U.S.C.A., respectively.

Respectfully submitted,

EVANS, KITCHEL & JENCKES

By JOHN F. BOLAND, JR.

*Attorneys for Petitioner
American Smelting &
Refining Company*

I certify that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, 28 U.S.C.A., and that, in my opinion, the foregoing Brief is in full compliance with those rules.

JOHN F. BOLAND, JR.

United States Court of Appeals
FOR THE NINTH CIRCUIT

AMERICAN SMELTING & REFINING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION TO REVIEW AND SET ASIDE, AND ON CROSS-
PETITION TO ENFORCE AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

MICHAEL N. SOHN,
CORINNA LOTHAR METCALF,
Attorneys,

National Labor Relations Board

FILED

MAR 22 1968

WIM B. LUCK, CLERK

MAR 28 1968

(i)

INDEX

	<u>Page</u>
JURISDICTION	1
COUNTERSTATEMENT OF THE CASE	2
I. The Board's Findings of Fact	2
A. Background	2
B. Company housing at the Silver Bell Mine	3
C. The Company unilaterally raises the rents on its Silver Bell houses	5
II. The Board's Conclusion and Order	6
ARGUMENT	6
The Board properly concluded that the Company violated Section 8(a) (5) and (1) of the Act by unilaterally increasing the rental charges for Company housing at its Silver Bell Mine	6
A. Introduction	6
B. In the circumstances of this case, rentals charged employees are a mandatory subject of bargaining	9
CONCLUSION	17
CERTIFICATE	18
APPENDIX	A-1

AUTHORITIES CITED

	<u>Page</u>
<u>Cases:</u>	
<i>C & C Plywood,</i> 148 NLRB 414	16
<i>Fibreboard Paper Prods. Corp. v. N.L.R.B.,</i> 379 U.S. 203	8, 9
<i>General Tel. Co. of Fla. v. N.L.R.B.,</i> 337 F. 2d 452 (C.A. 5)	16
<i>Inland Steel Co. v. N.L.R.B.,</i> 170 F. 2d 247 (C.A. 7), cert. den., 336 U.S. 960	9
<i>Kohler Co.,</i> 128 NLRB 1062, enf'd in part, remanded in part, 300 F. 2d 699 (C.A. D.C.), cert. den., 370 U.S. 911	14, 15
<i>McLean v. N.L.R.B.,</i> 333 F. 2d 84 (C.A. 6)	9
<i>N.L.R.B. v. American National Ins. Co.,</i> 343 U.S. 395	8
<i>N.L.R.B. v. Bemis Bro. Bag Co.,</i> 206 F. 2d 33 (C.A. 5)	13, 14
<i>N.L.R.B. v. C & C Plywood Corp.,</i> 385 U.S. 421	16
<i>N.L.R.B. v. Gulf Power Co.,</i> 384 F. 2d 822 (C.A. 5)	9
<i>N.L.R.B. v. Hart Cotton Mills,</i> 190 F. 2d 964 (C.A. 4)	12
<i>N.L.R.B. v. Jacobs Mfg. Co.,</i> 196 F. 2d 680 (C.A. 2)	16
<i>N.L.R.B. v. Lehigh Portland Cement Co.,</i> 205 F. 2d 821 (C.A. 4)	11, 12, 13, 14
<i>N.L.R.B. v. Niles-Bement-Pond Co.,</i> 199 F. 2d 713 (C.A. 2)	16

(iii)

	<u>Page</u>
<i>N.L.R.B. v. Wooster Div. of Borg-Warner Corp.</i> , 356 U.S. 342	9
 <u>Statute:</u>	
National Labor Relations Act, as amended (61 Stat 136, 73 Stat. 519, 29 U.S.C., Sec. 151, <i>et seq.</i>)	2
Section 8(a) (1)	2, 6
Section 8(a) (5)	2, 6
Section 8(b) (3)	7
Section 8(d)	7
Section 9(a)	7
Section 10(c)	2
Section 10(e)	2
Section 10(f)	2
 <u>Miscellaneous:</u>	
93 Cong. Rec. 6443, 2 Leg. Hist. 1539	9
Cox & Dunlop, <i>The Duty to Bargain Collectively During the Term of an Existing Agreement</i> , 63 Harv. L. Rev. 1097, 1116, <i>et seq.</i> , esp. 1118 (1950)	16
House Report No. 245, 80th Cong., 1st Sess., 22-23, 1 Leg. Hist. 313-314	8
H. R. 3020, 80th Cong., 1st Sess., Sec. 2(11), 1 Leg. Hist. of the LMRA, 1947 (G.P.O., 1948), 163-167	8
House Minority Report No. 245, 80th Cong., 1st Sess., 71, 1 Leg. Hist. 362	9
P. Ross, <i>The Government as a Source of Union Power: The Role of Public Policy in Collective Bargaining</i> , pp. 155-159, 262-265 (Brown Univ. Press, 1965)	8

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,216

AMERICAN SMELTING & REFINING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION TO REVIEW AND SET ASIDE, AND ON CROSS-
PETITION TO ENFORCE AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of American Smelting & Refining Company (hereinafter called "the Company") to review and set aside an order of the National Labor Relations Board (R. 43-50).¹ In its answer to the

¹ "R" references are to pages of Volume I of the record as reproduced according to Rule 10 of the Rules of this Court. "Tr." references are to the transcript of testimony. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

petition, the Board has requested that its order be enforced in full (R. 52-53). The Board's Decision and Order issued on August 24, 1967, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151 *et seq.*) and are reported at 167 NLRB No. 26. This Court has jurisdiction of the proceeding under Section 10(e) and (f) of the Act, the unfair labor practice having occurred at Silver Bell, Arizona, within this judicial circuit. No jurisdictional issue is presented.

COUNTERSTATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by increasing rental charges for Company housing at its Silver Bell mine without prior negotiation with the Union (R. 24-25).² The underlying facts may be summarized as follows:

A. Background

Silver Bell, Arizona, is located approximately 40 miles from Tucson (R. 12; Tr. 6, 38). In December 1951, the Company contracted out a copper stripping and mining operation to Isbell Construction Company, whose employees performed

² Local Union 13886, International Union of District 50, United Mine Workers of America.

the stripping and mining until April 1, 1957, at which time the Company's employees took over those functions (R. 12; Tr. 8). The Company's crusher and concentrator³ were completed in 1954 and the first production from the mine was shipped in that year (R. 12; Tr. 9).

Upon completion of the crusher and concentrator in 1954, the Company recognized the Union as the bargaining representative of its production and maintenance employees at Silver Bell (R. 12; Tr. 11).⁴ The first labor agreement between the Company and the Union was concluded on December 15, 1954. Later agreements were negotiated in 1956, 1959, 1961, 1962 and 1964. The 1964 agreement terminated on September 30, 1967 (R. 14; Tr. 11).

B. Company Housing at the Silver Bell Mine

The Company commenced construction of a townsite at Silver Bell late in 1951. The first houses were occupied in the fall of 1952. The town, as it presently exists, consists of 175 detached single family dwellings, of which 68 are three-bedroom houses and 107 are two-bedroom houses. In addition,

³ A crusher is employed to reduce the mined mineral to a sand-like consistency. The concentrator, thereafter, separates the ore from impurities in the crushed copper.

⁴ Since the mining employees at that time were employed by Isbell Construction Company, they were not included in the unit (R. 12; Tr. 11). Beginning with the 1956-1959 agreement, however, and in all subsequent agreements, the mining employees became part of the bargaining unit (R. 13; Tr. 12).

there are 24 two and three bedroom apartments, and 50 trailer spaces.⁵(R. 12; Tr. 8-9). The town also includes a grocery store, a church, a barber shop, a post office and a service station (R. 12; Tr. 77, 89).

From 1952 until April 1, 1957, the dwellings were occupied by employees of the Company and of Isbell Construction Company. Since April 1, 1957, with the exception of a few individuals (the minister, the barber and employees of one of the Company's sub-contractors), all occupants have been Company employees (R. 13; Tr. 9, 12, 24-25).

As of October 12, 1966, the Company employed 317 persons at Silver Bell, 264 of whom were in the bargaining unit. Of these 264, 175 (approximately 65%) lived in Company housing at Silver Bell⁶ (R. 13; Tr. 12). Since Company housing at Silver Bell was adjacent to the mine, it took employees who lived there "about two minutes" to get to work (Tr. 38). Most of the remaining 89 bargaining unit employees lived 40 miles away in Tucson, and a few lived in the intermediate communities of Marana and Cortaro, both of which are approximately 25 miles from the Silver Bell mine (R. 12-13, 23-24; Tr. 63).

Although no one is required by the Company to live in its houses, they are all occupied and there is a waiting list (R. 13; Tr. 19, 64-5). Since the houses were opened in 1952, rentals

⁵ The Company did not raise the rent it charged for apartments and trailer spaces (R. 13; Tr. 14).

⁶ Thirty-three salaried employees who are not in the bargaining unit also lived in Company houses. (R. 13; Tr. 13).

have been \$45.00 for a two-bedroom house and \$50.00 for a three-bedroom house, including utilities (R. 13; Tr. 18). Tenants entered into written leases with the Company covering terms of their tenancy, and employees paid their rent by payroll deductions which they had authorized in writing (R. 13; Tr. 16, 48). Operation and maintenance of the residences and the townsite were performed by the Company's maintenance employees (R. 13; Tr. 16). At no time between 1952 and 1966 did the Company raise the rental charges (R. 15; Tr. 16).

C. The Company Unilaterally Raises the Rents on Its Silver Bell Houses

On July 22, 1966, the Company sent a letter to each of its tenants announcing the first rent increase since the houses were opened 14 years before (Co. Br. p. 5). The letter stated that, effective August 1, 1966, the rent on two bedroom houses would be increased by \$5.00 and that the charge for three bedroom houses would be \$10.00 per month higher (R. 13; Tr. 14). The Union was not consulted prior to this decision to raise rents, the first such increase since it had become the bargaining representative (R. 13; Tr. 13-14, Co. Br. p. 5).

Shortly after the raise was announced, a grievance meeting was held at which Union representatives stated that any increase in rent must be negotiated with the Union. However, Company officials replied that rentals were not a bargaining matter and were "none of the Union's business" (R. 13; Tr. 46). The Union, thereupon, requested a negotiating meeting between the Company and the International and Local Unions. However, at the subsequent meeting called by the Company on August 17, 1966, the Company again refused to bargain

concerning the rent increases (R. 13; Tr. 46-47). The new rentals went into effect on September 1, 1966 (R. 13; Tr. 15, 47).

II. THE BOARD'S CONCLUSION AND ORDER

The Board concluded that the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union concerning rent increases on Company housing at Silver Bell. Accordingly, the Board ordered the Company to cease and desist from unilaterally increasing rental charges without prior notification to, and bargaining with, the Union. Affirmatively, the Board ordered the Company to reinstate the rental charges in effect prior to the unilateral increases; to make whole, with interest at 6% per annum, all employees in the unit who had paid the increased rental charges; and to post appropriate notices (R. 39 fn. 1, 40, 24-25).

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY INCREASING THE RENTAL CHARGES FOR COMPANY HOUSING AT ITS SILVER BELL MINE

A. Introduction

The Company concedes that it unilaterally raised the rent charged employees for Company-owned housing at the Silver Bell mine site. Its sole defense to the finding that its action constituted an unlawful refusal to bargain is that the rent

charged employees was not a mandatory subject of bargaining. We show below that the Board's contrary conclusion is supported by both precedent and policy and that its bargaining order should be enforced.

Section 8(a)(5) of the National Labor Relations Act declares it to be an unfair labor practice for an employer

to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).⁷

Section 9(a), the relevant portion of which was part of the original Wagner Act, provides that the representative designated by the majority shall be the exclusive representative

for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

Section 8(d), added in 1947 by the Taft-Hartley amendments, provides, *inter alia*, as follows:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment

Thus, the above conditions impose on both the employer and the union the duty to bargain with each other in good faith with respect to "wages, hours and other terms and con-

⁷ Section 8(b)(3), in similar terms, proscribes a union's refusal to bargain with the employer.

ditions of employment.” *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395.

By its contention that this phrase does not encompass the rentals charged employees at Silver Bell, the Company necessarily asserts that the employees’ objections to the increased charge for Company housing at the mine site is a dispute which need not be resolved within “the framework established by Congress as most conducive to industrial peace.” *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 211. Yet, “[o]ne of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.” *Ibid.* The only question, therefore, is whether the dispute shall be resolved within the framework of collective bargaining established by national policy or left outside that framework, to fester without negotiation and perhaps break out in economic warfare.⁸

Cognizant of the industrial strife brought on by refusals to confer and negotiate, Congress intended the phrase “terms and conditions of employment” to be applied broadly. Indeed, in 1947, Congress considered and rejected proposals of narrower phraseology, which were offered in an effort to curtail the scope of mandatory labor-management negotiations.⁹

⁸ See P. Ross, *The Government as a Source of Union Power: The Role of Public Policy in Collective Bargaining*, pp. 155-159, 262-265 (Brown University Press, 1965).

⁹ H.R. 3020, 80th Cong., 1st Sess., Sec. 2(11), 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), 163-167; House Report No. 245, 80th Cong., 1st Sess., 22-23, 1 Leg. Hist. 313-314. The change was opposed on the ground, *inter alia*, that what is a proper subject for collective bargaining “should not be strait-jacketed by legislative
(continued on p. 9)

Furthermore, it is well-settled that bargaining is required with respect to numerous other subjects of employee concern beyond working hours and wages.¹⁰ We show below that where, as here, Company housing is adjacent to the place of work, alternative housing is 25 to 40 miles away, and rental charges for the Company housing have not changed for 14 years, such housing, like the subjects listed above, constitutes an important employee benefit and a “condition of employment” concerning which there may be no alteration prior to negotiation with the employees’ collective bargaining representative.

B. In the circumstances of this case, rentals charged employees are a mandatory subject of bargaining

As detailed in the Counterstatement, the Company began construction of the housing at Silver Bell in late 1951 – the same time that it started stripping the overburden from the mine. Since then, the Company has continually owned and

(9 Continued)

enactment.” House Minority Report No. 245, 80th Cong., 1st Sess., 71, 1 Leg. Hist. 362. The Senate resisted the proposed change, and the Wagner Act definition of bargaining was left unchanged. See 93 Cong. Rec. 6443, 2 Leg. Hist. 1539.

¹⁰ Thus, the statutory phrase “conditions of employment” has been held to encompass retirement and pension plans (*Inland Steel Corp. v. N.L.R.B.*, 170 F.2d 247 (C.A. 7), certiorari denied on this issue, 336 U.S. 960); health plans (*McLean v. N.L.R.B.*, 333 F.2d 84 (C.A. 6)); safety rules (*N.L.R.B. v. Gulf Power Co.*, 384 F.2d 822 (C.A. 5)); union security clauses (*N.L.R.B. v. Wooster Div., Borg-Warner Corp.*, 356 U.S. 342); and the subcontracting of bargaining unit work (*Fibreboard Paper Products Corp. v. N.L.R.B.*, *supra*).

maintained the houses, using its own maintenance employees to perform the latter task. Sixty-five percent of the bargaining unit employees live in these houses. The handful of non-employee occupants of Silver Bell homes are either employees of a subcontractor working at the mine for the Company or individuals such as a grocer, a barber and a minister, all of whom serve the employee community. In short, the townsite at Silver Bell is a "company town," constructed and maintained for the purpose of providing accessible housing for people who work at the mine.¹¹

The record shows that the Company has always viewed the Silver Bell homes as an employee benefit. Thus, it is established Company policy that when an individual leaves the

¹¹ The Company states that "homes are rented, and in the past have been extensively rented, to, 'outsiders', which further shows that this was not a term and condition of employment." (Co. Br. p. 27). However, the stipulated evidence is that the "outsiders," aside from the grocer, the minister and the barber, who have lived at Silver Bell in the past were employees of Isbell Construction Company who were then engaged in performing mining operations pursuant to a subcontracting arrangement with the Company. No Isbell employees have resided at Silver Bell since April 1, 1957 when the Company's own employees completely took over this operation themselves (Tr. 8-9). This is the sum total of the evidence of past residence of "outsiders". As to the present, only a small percentage of residents of Silver Bell are non-employees of the Company. These include the three individuals mentioned above and "certain employees" of a company performing drilling operations at Silver Bell pursuant to a subcontract with the Company (Tr. 24-26). We submit that this evidence hardly detracts from the finding that Silver Bell is essentially maintained in order to provide a nearby place to live for employees working at the mine.

Company's employ, he must vacate his Silver Bell home shortly thereafter.¹² Furthermore, in a prior contract negotiation, the Company met Union demands to equalize a pay differential between Silver Bell and another area mine by explaining that employees at the other mine received travel allowance whereas Silver Bell employees had housing available at the mine site (R. 40; Tr. 45, 90-93).

More importantly, regardless of how the Company viewed the Silver Bell housing facilities, it is clear that these houses constituted a substantial employee benefit. The convenience of living adjacent to one's place of work — especially when the alternative is living from 25 to 40 miles away — cannot be discounted. Moreover, the fact that rentals had not changed for 14 years clearly indicates that, prior to the unilateral increase, Silver Bell homes were renting below the prevailing rate. See, *N.L.R.B. v. Lehigh Portland Cement Co.*, 205 F.2d 821, 823 (C.A. 4). It is little wonder that there are no empty houses and that there is a waiting list of employees anxious to fill

¹² We are unable to understand the significance which the Company attaches to the fact that it allowed one employee to remain at Silver Bell for six to eight weeks subsequent to the time he left the Company's employ (Co. Br. pp. 27-28). Surely, whether or not these homes constitute a term and condition of employment does not turn on whether an employee whose employment terminates is given a reasonable period of time to find other housing rather than being forced to vacate immediately. The crucial consideration in this respect is that all parties understand that, with the exception of the few people who service the community, employment at Silver Bell is a *sine qua non* of residence there.

In any event, we concede that, in the Company's words, this was "[t]he best example" of the Company's alleged practice of allowing "outsiders" to live at Silver Bell (Co. Br., p. 27).

any vacancies which occur. As the Board found, these circumstances have "given the occupants of the company's housing substantial advantages which undoubtedly affect their conditions of employment" (R. 39, n. 1).

The case most closely approximating the situation here involved clearly supports the Board's conclusion. In *N.L.R.B. v. Lehigh Portland Cement Co.*, 205 F.2d 84 (C.A. 4), only 25 percent of the employees lived in homes owned by the employer as compared with 65 percent in the case at bar. The employer raised the rent without consultation with the union and defended the ensuing refusal to bargain charge on the ground that the employees were not required to live in company houses. The Court expressly refused to hold, as the company urges this Court to hold, that the rental charged by the employer could not be a mandatory subject for bargaining unless living in company houses was a necessary aspect of working for the employer.¹³ "It is sufficient to bring them within the field of collective bargaining if their ownership and management materially affects the conditions of employment." 205 F.2d at 823. On grounds identical to those relied upon by the Board here, the Court concluded that, in the circumstances presented, conditions of employment were materially affected.

¹³ The Court denied the contention that its earlier decision in *N.L.R.B. v. Hart Cotton Mills, Inc.*, 190 F.2d 964, stood for this proposition, stating, "we did not lay down the general proposition that company houses were never the proper subject of collective bargaining unless they are a necessary part of the enterprise or their occupancy affects the workers' pay." 205 F.2d at 823.

Nevertheless, petitioner here quotes the same portions of the *Hart* opinion urged upon the Court in *Lehigh* and gives the *Hart* decision an interpretation which has been expressly rejected by the court which issued it. See Co. Br. p. 29.

“That no increase in rent was made between 1937 and 1951 indicates that the rents have been below the prevailing rate; and this circumstance coupled with the convenience of living nearer to the place of work than the great majority of the employees has given the occupants of the company’s houses substantial advantages which undoubtedly affected their conditions of employment Under the circumstances of this case the matter is of sufficient importance as to require its submission to the process of collective bargaining.” 205 F.2d at 823-824.¹⁴

N.L.R.B. v. Bemis Bro. Bag Co., 206 F.2d 33 (C.A. 5), heavily relied upon by the Company (Br. pp. 22-27), is distinguishable. In *Bemis*, the Court noted that the company’s plant was “immediately adjacent” to Talledega, Alabama, a city of some 13,800 inhabitants, and that the company’s houses “are located in the immediate area adjoining the city limits of Talledega, and are approximately two miles from the center of town.” 206 F.2d at 35. The Court further noted that although all the company’s houses were filled, “there are vacant dwellings available for rental in the community” and indeed, sufficient accommodations in the community for all of the company’s employees. 206 F.2d at 36. Thus, in *Bemis*,

¹⁴ The Company seeks to minimize the applicability of *Lehigh Portland* by emphasizing the fact that the Court limited its holding to “the circumstances of this case.” See Co. Br., p. 28, italicizing this language from the Court’s opinion. However, as the portion of the Court’s opinion quoted in the text illustrates, the circumstances deemed crucial by the *Lehigh-Portland* court — no increase in rentals for 14 years coupled with the convenience of living close to the place of work — are precisely the circumstances relied on by the Board in the case at bar.

the alternative to living in company houses was not a twenty-five or forty mile trip to work. In *Bemis*, unlike this case or *Lehigh Portland*, *supra*, the convenience of living close to one's place of work was not peculiar to the employer's housing facilities.¹⁵

Bemis is further distinguishable from *Lehigh Portland* and the case at bar in that there the employer was not raising the rental for the first time in many years. Rather the employer sought only to return to the rate he had charged a few years earlier. 206 F.2d at 34. Thus, one could not conclude, as did the Court in *Lehigh*, that a long unchanged rental was below the prevailing rate. In short, in *Bemis* the Court had reason for holding that no substantial employee benefit was involved and that the record did not reveal "any reason save individual choice why one-third of the employees occupy company housing." 206 F.2d at 38. This is not the situation here presented.¹⁶

¹⁵ The Company recognizes that *Bemis* is thus distinguishable (Co. Br., pp. 26-27). Furthermore, the portions of the Court's opinion quoted in the text belie the Company's contention that the Court did not give emphasis to these factors.

¹⁶ *Kohler Co.*, 128 NLRB 1062, enforced in part and remanded in part, 300 F.2d 699 (C.A. D.C.), cert. denied, 370 U.S. 911, does not aid petitioner. There, the Court enforced the Board's ruling that the employer violated Section 8(a)(1) of the Act by evicting employees from company-owned housing in reprisal for strike activities. 300 F.2d at 701, n. 1. The Court did not discuss the portions of the Board's decision quoted at length at Co. Br., pp. 31-32. The Board was there assessing the further contention that the evictions also constituted a violation of Section 8(a)(3), an issue which, it pointed out, had no significant impact on the case before it since the desired remedy — repossession of company houses — had been already granted in view of the finding that Section

(Continued on p. 15)

Finally, the Company makes much of the fact that its witnesses testified that when contracts were negotiated the Union never sought to raise the matter of rental charges. See Co. Br., pp. 9-16. The Trial Examiner credited the Company's witnesses on this point, at least as to the negotiations immediately prior to the latest collective bargaining agreement (R. 14).¹⁷ However, there is no merit to the contention that

¹⁶ (Continued)
 8(a) (1) had been violated. 128 NLRB at 1093, n. 53.

In any event, the Board and the Trial Examiner were in substantial agreement that on the evidence presented, company housing was not shown to be a term and condition of employment (and hence there was no discrimination within the meaning of Section 8(a) (3)) because residence was not restricted to employees, rents had not been shown to be below prevailing rates and there was no showing that other nearby facilities were not available. 128 NLRB at 1092, 1186-1187. The Trial Examiner had taken the view that these factors were overcome as to one employee, Faas, because his lease formerly contained a clause linking his rental charge to his employment status. 128 NLRB at 1187-1189. However, the Board was unable to agree with the conclusion that this outweighed the other factors involved because the crucial clause had been omitted from Faas' present lease and because there had been no showing that his rental was lower than that paid by other tenants, employee or nonemployee. 128 NLRB at 1092-1093. As demonstrated in the text, here, unlike *Kohler*, the record does contain other evidence establishing that the Company's housing facilities at Silver Bell constituted a term and condition of employment.

¹⁷ Contrary to the Company's witnesses, the Union negotiator testified that during all prior negotiations the Union had asked for and received assurances that rents would not be raised (Tr. 41-43). The Trial Examiner discredited his testimony concerning the last negotiations because no mention of such assurances was included in a prehearing affidavit which the Union witness had given a Board investigator. That affidavit did contain some mention of an assurance of this type during the 1956 negotiations (Respondent's Exhibit 1), but the Trial Examiner made no express credibility finding concerning negotiations other than the latest talks. As we show in the text, the matter was legally irrelevant.

because the contract and the parties were silent on the subject, the employer cannot be required to bargain prior to increasing the rental charge. Silence with respect to a mandatory bargaining subject at the time the contract is entered into does not relieve the parties of all subsequent obligation to bargain about such a subject. *N.L.R.B. v. Jacobs Mfg. Co.*, 196 F.2d 680, 684 (C.A. 2). Certainly, where no contract provision covers a mandatory bargaining subject of bargaining, the employer may not make unilateral changes respecting that subject and refuse to discuss the matter with the union. *N.L.R.B. v. C & C Plywood Corp.*, 385 U.S. 421, 430; *General Tire Co. of Fla. v. N.L.R.B.*, 337 F.2d 452, 454 (C.A. 5); *N.L.R.B. v. Niles-Bement-Pond Co.*, 199 F.2d 713 (C.A. 2).

As these cases further show, the fact that the union did not raise a particular subject during bargaining and that the contract contains no provision concerning it, does not constitute a waiver by the union of its right to be consulted with respect to changes in that subject which the employer seeks to institute. Such a waiver by the union must be "clear and unmistakable" and will be inferred only if an evaluation of prior negotiations indicates that the matter was fully discussed and that the union consciously yielded its interest in the matter. *C & C Plywood*, 148 NLRB 414, 416, approved, *N.L.R.B. v. C & C Plywood*, *supra*, 385 U.S. at 430-431.¹⁸ Nothing in this

¹⁸ Compare the views of Professors Cox and Dunlop who take the position that in the absence of evidence to the contrary, the parties are to be presumed to have agreed that major terms and conditions of employment not covered by the contract would remain as they were *unless changed by mutual agreement*. Cox & Dunlop, *The Duty To Bargain Collectively During The Term of an Existing Agreement*, 63 Harv. L. Rev. 1097, 1116 et seq., especially 1118 (1950).

record would support a finding that the Union waived its right to bargain about rental increases involving employee housing. In these circumstances, the Company must adhere to existing working conditions or bargain with the Union with respect to any changes.

CONCLUSION

For the foregoing reasons, the Company's petition to review the Board's order should be denied, and the Board's order should be enforced in full.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

MICHAEL N. SOHN,
CORINNA LOTHAR METCALF,
Attorneys,

National Labor Relations Board.

March 1968

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel,
National Labor Relations Board

A-1

APPENDIX

Index to Reporter's Transcript

(Numbers are to pages of Reporter's transcript)

Board Case No. 28-CA-1435

GENERAL COUNSEL'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>
1(a)-1(f)	5	5	5
2	6	6	7
3	9	9	10
4	11	11	12
5	14	14	15
6	16	16	17
7	19	20	28
8	31	31	Rejected
9	33	33	Rejected
10	62		

RESPONDENT'S EXHIBITS

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received in Evidence</u>
1	52	56	57
2	68	68	96

CASILLAS PRESS, INC.
1000 Connecticut Avenue Building
1717 K Street, N. W.
Washington, D. C. 20006

No. 22216

In the
United States Court of Appeals
For the Ninth Circuit

AMERICAN SMELTING & REFINING COMPANY,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition to Review and Set Aside an Order of the
National Labor Relations Board

Reply Brief of Petitioner
American Smelting & Refining Company

EVANS, KITCHEL & JENCKES

363 North First Avenue
Phoenix, Arizona 85003

*Attorneys for Petitioner
American Smelting &
Refining Company*

FILED

APR 11 1968

WM. B. LUCK, CLERK

TABLE OF CONTENTS

	Page
The Respondent's Counterstatement of the Case.....	1
Respondent's Assertion That the Phrase "Terms and Conditions of Employment" Is to Be Applied Broadly, in Compliance with Congressional Intent	2
Respondent's Assertion That in the Circumstances of This Case Rental Charged Employees Is a Mandatory Subject of Bargaining	4
Conclusion	8

CITATIONS

CASES	Pages
Bilton Insulation, Inc. v. NLRB, 303 F.2d 98 (C.A.4, 1962)....	7
Kohler Company, 128 NLRB 1062, 300 F.2d 699 (C.A.D.C. 1962), cert. den., 370 U.S. 911.....	8
NLRB v. Bemis Bro. Bag Co., 206 F.2d 33 (C.A.5, 1953).....	8
NLRB v. Brady Aviation, 224 F.2d 23 (C.A.5, 1955).....	7
NLRB v. Great Atlantic and Pacific Tea Company, 346 F.2d 936 (C.A.5, 1965)	7
NLRB v. Hart Cotton Mills, Inc., 190 F.2d 964 (C.A.4, 1953)	8
NLRB v. Lehigh Portland Cement Co., 205 F.2d 821 (C.A.4, 1953)	5
Westinghouse Electric Corporation v. NLRB, 387 F.2d 542 (C.A.4, 1967)	3, 4

STATUTES AND TREATISES

51 C.J.S. Labor Relations § 561.....	7
Title 29, U.S.C.A. :	
Section 158 (a) (1)	8
Section 158 (a) (5)	8, 9
Section 158 (d)	9
Section 159 (a)	9

No. 22216

In the
United States Court of Appeals
For the Ninth Circuit

AMERICAN SMELTING & REFINING COMPANY,	}
<i>Petitioner,</i>	

VS.

NATIONAL LABOR RELATIONS BOARD,	}
<i>Respondent.</i>	

Petition to Review and Set Aside an Order of the
National Labor Relations Board

Reply Brief of Petitioner
American Smelting & Refining Company

THE RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Rule 18 of this Court provides in part that:

"His (Respondent's) brief shall be of like character with that required of the appellant (Petitioner), except that no specification of error shall be required, *and no statement of the case, unless that presented by the appellant (Petitioner) is controverted.*" (Emphasis supplied)

Respondent has not pointed to any factual statement in Petitioner's opening brief which is challenged. Instead of

taking issue with the factual picture presented by Petitioner, Respondent has presented a watered-down and abbreviated "counterstatement" of the case without either challenging or agreeing with Petitioner's statement. Therefore, Petitioner submits that no purpose can be served by making any further comment concerning the Respondent's counterstatement of the case, but instead believes that it would be of greater benefit to comment directly on Respondent's argument in connection with the facts involved herein.

RESPONDENT'S ASSERTION THAT THE PHRASE "TERMS AND CONDITIONS OF EMPLOYMENT" IS TO BE APPLIED BROADLY, IN COMPLIANCE WITH CONGRESSIONAL INTENT

The Respondent, hoping to convince this Court that the subject of rental of company housing should always, under all circumstances, be a mandatory subject of collective bargaining, irrespective of the facts in any particular case, asserts that "Congress intended the phrase 'terms and conditions of employment' to be applied broadly." (Bd. Br., 8)* Respondent attempts to support this view by citing various Congressional reports and then comments that "bargaining is required with respect to numerous other subjects of employee concern beyond working hours and wages." (Bd. Br. 9) Petitioner does not take issue with the fact that the courts have held that various subjects of employee concern have, *under the facts of each case* been considered as "terms and conditions of employment", but Petitioner strongly doubts that Congress meant for the phrase "terms and conditions of employment" to be applied broadly whenever possible. Respondent Board again erroneously restates this position here despite the decision of the Court

*"Bd. Br." refers to the National Labor Relations Board's Brief. "R.T." references are to the transcript of testimony.

in the most recent case of *Westinghouse Electric Corporation v. NLRB*, 387 F.2d 542, 545-546 (C.A. 4, 1967), wherein the Court refutes this very contention made by Respondent:

“The statutory phrase—‘terms and conditions of employment’—according to the Board, is intended by Congress to be used in its ‘broadest sense’ and encompasses virtually everything which bears on the employment relationship and to which workers seek management’s agreement. *However, the legislative history does not support the Board’s view of congressional intent and design. At best, the history merely shows that Congress did not desire to enumerate specific bargaining subjects; it does not show that the phrase was meant to embrace every issue that might be of interest to unions or employers. To the contrary, as Mr. Justice Stewart stressed, in his concurring opinion in Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 220-221, 223-224, 85 S.Ct. 398, 408-410, 13 L.Ed.2d 233 (1964):*

‘It is important to note that the words of the statute are words of limitation. The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining. The limiting purpose of the statute’s language is made clear by the legislative history of the present Act. As originally passed, the Wagner Act contained no definition of the duty to bargain collectively. In the 1947 revision of the Act, the House bill contained a detailed but limited list of subjects of the duty to bargain, excluding all others. In conference the present language was substituted for the House’s detailed specification. While the language thus incorporated in the 1947 legislation as enacted is not so stringent as that contained in the House bill, it nonetheless adopts the same basic approach in seeking to define a limited class of bargainable issues.

‘The phrase ‘conditions of employment is no doubt susceptible of diverse interpretations. At the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment. Such an interpretation, which would in effect place the compulsion of the Board behind any and all bargaining demands, would be contrary to the intent of Congress, as reflected in this legislative history.’ (Emphasis supplied)

Therefore, in view of the express language of *Westinghouse Electric Corporation v. NLRB*, *supra*, unless the testimony and other evidence in the record show that the ownership and management *materially* affected the conditions of employment and that rental of the houses involved had a *substantial* effect upon the “terms and conditions of employment”, then the increase of rent by the Petitioner cannot be considered a mandatory subject of bargaining. *Westinghouse Electric Corporation v. N.L.R.B.* (C.A.4, 1967) 387 F.2d 542, 547.

RESPONDENT'S ASSERTION THAT IN THE CIRCUMSTANCES OF THIS CASE RENTAL CHARGED EMPLOYEES IS A MANDATORY SUBJECT OF BARGAINING

The Respondent asserts that the rental of the company houses is a mandatory subject of bargaining since the company housing constitutes a substantial employment benefit for two reasons. The first alleged benefit is “the convenience of living adjacent to one’s place of work—especially when the alternative is living from 25 to 40 miles away—.” (Bd. Br. 11) The second is “the fact that rentals had not changed for 14 years clearly indicates that, prior to the unilateral increase, Silver Bell homes were renting below the prevailing rate.” (Bd. Br. 11) It is obvious, after reviewing the entire record, that these were the only two possible

reasons Respondent could give that might be supported by any of the company housing cases. The Respondent relies solely on *NLRB v. Lehigh Portland Cement Co.*, 205 F.2d 821, 823 (C.A.4, 1953) in support of its position for the reason that the holding in *Lehigh* is based on *facts* which the Respondent claims exist in the instant case, but Respondent fails to point out where in the record these facts were established. Petitioner submits that they never were. At the beginning of the hearing before the Trial Examiner, the Trial Examiner asked the counsel for General Counsel if there would be any testimony to show whether or not the rentals paid by the tenants were comparable to the prevailing rentals of comparable property in the community and counsel stated that he had evidence to prove this. (R.T. 13) The evidence that counsel attempted to have admitted in order to prove that the rent charged for the company housing was lower than the prevailing rates for comparable housing in the community were: (1) portions of the classified advertisement sections from two editions of the *Arizona Daily Star*, a Tucson, Arizona, newspaper, which supposedly showed rental prices of homes in Tucson (R.T. 31-33), which evidence was rejected by the Trial Examiner as being hearsay (R.T. 33); and (2) testimony from Albert W. Avenetti regarding the difference in rental charges for a home in Tucson as compared to the rental charges for the company houses (R.T. 35), which testimony was rejected by the Trial Examiner for the reason that the witness was not competent to testify regarding comparable rental rates. (R.T. 39) Counsel for General Counsel had no other evidence to submit regarding the prevailing rental rates for comparable housing in the community, as is evident from his statement at the hearing. (R.T. 39, lines 8-16):

"TRIAL EXAMINER:

* * *

"Now let me say this: Is there anything further you want to get on the record as to what you propose to prove in addition to what you have already said, Mr. Harris, from this witness?

MR. HARRIS: From this witness?

TRIAL EXAMINER: With respect to comparable housing and the prevailing rate.

MR. HARRIS: No, there is nothing further except for the trial examiner's ruling. * * * *

From this it is apparent that the General Counsel failed to prove that the company house rents were below the prevailing rates in the surrounding community or communities. For the Respondent to ask the Court to accept its inference as fact, in view of the above testimony, is improper. Without evidence supporting such a conclusion, no valid conclusion can be reached as to comparable rental values from the fact that Petitioner had not raised the rent for a 14 year period. (Bd. Br. 5)

The record is also void of testimony or other evidence that it was more "convenient" for the employees to live adjacent to their place of work rather than in one of the surrounding communities. Today the use of automobiles permits a person to travel greater distances to and from work. Many people have moved away from their places of employment, which are often, if not usually, located in areas incompatible with comfortable residential living, and drive several miles to and from work. This has, in fact, probably become the rule rather than the exception in this present day. Also, as counsel for the Petitioner pointed out at the hearing (R.T. 37) the convenience of living in Tucson, Arizona, where there are restaurants, theaters, public

transportation and recreational facilities, could easily outweigh any convenience that may be derived from living near the mine. Therefore, for the Respondent to assert generally that it is “more convenient” to live next to the mine, rather than in one of the surrounding communities (R.T. 11), without having any testimony or other evidence to support its position, certainly shows the true weakness of its case. Furthermore, if it was so much more “convenient” to live at the mine it is reasonable to conclude that there would be no vacancies in the two and three bedroom apartments. Such vacancies do exist however. (R.T. 19)

Having failed to prove either of these two factual bases for its conclusions that the rental of the company houses was a mandatory subject of collective bargaining, Respondent should not prevail here. It is the general rule, as stated in *NLRB v. Great Atlantic and Pacific Tea Company*, 346 F.2d 936, 939-940 (C.A.5, 1965) that:

“When the General Counsel charges that an employer has committed an unfair labor practice, he must produce *substantial evidence* from which it may be inferred that a violation of the Act took place. Therefore, the burden of establishing a refusal to bargain in good faith rests initially with the General Counsel.” (Emphasis supplied)

The burden of proof is on the one alleging violation of the statute to prove that unfair labor practices have been committed, and it is not incumbent on the Respondent to disprove them! *NLRB v. Brady Aviation*, 224 F.2d 23 (C.A. 5, 1955); 51A C.J.S. *Labor Relations* § 561.

Because the General Counsel has failed to prove its case with substantial evidence, this Court should not hesitate to set aside the Board’s order, as was so stated in *Bilton Insulation, Inc. v. NLRB*, 303 F.2d 98, 103 (C.A.4, 1962):

“The test of the substantiality of evidence in such cases is the same as in other cases; but it is also held that the reviewing function of the decisions of the Labor Board has been deposited with the Court of Appeals and that the Board’s finding of fact must be supported by substantial evidence ‘on the record considered as a whole’ and that the reviewing court ‘is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view’.”

Petitioner submits that an examination of all of the company housing cases, including *NLRB v. Bemis Bro. Bag Co.*, 206 F.2d 33 (C.A.5, 1953); *NLRB v. Hart Cotton Mills, Inc.*, 190 F.2d 964 (C.A.4, 1953) and *Kohler Company*, 128 NLRB 1062, 300 F.2d 699, *cert. den.* 370 U.S. 911, can only lead to the conclusion reached by the Board and Trial Examiner in *Kohler Company, supra*, which was that company housing was not shown to be a term and condition of employment because (1) residence was not restricted to employees; (2) rents had not been shown to be below prevailing rates; and (3) there was no showing that other nearby facilities were not available, since the same facts exist in the case at bar.

CONCLUSION

Petitioner respectfully submits, for all the foregoing reasons, that the order of the Board should be set aside and made of no force and effect and that the Board be ordered to issue an order that:

A. Petitioner did not violate Sections 8(a)(5) and (1) of the Act, Sections 158(a)(5) and (1), Title 29, U.S.C.A.;

B. That the rental of company housing by Petitioner at the Silver Bell, Arizona, facility was not a mandatory subject of collective bargaining under Sections 8(a)(5) and 8(d) of the Act; Section 158(a)(5) and 8(d), Title 29, U.S.C.A.; and

C. That the rental of said housing does not constitute wages and/or other conditions of employment under Section 8(a)(5), 8(d) and 9(a) of the Act, Sections 158(a)(5), 158(d) and 159(a), Title 29, U.S.C.A., respectively.

Respectfully submitted,

EVANS, KITCHEL & JENCKES

By JOHN F. BOLAND, JR.

*Attorneys for Petitioner
American Smelting &
Refining Company*

I certify that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, 28 U.S.C.A., and that, in my opinion, the foregoing Reply Brief is in full compliance with those rules.

JOHN F. BOLAND, JR.









